United States Court of Appeals
for the Second Circuit

APPENDIX

77-4057

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 77-4057, 77-4067,
77-4068, 77-4073,
77-4074, 77-4075

B

P/S

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents,

MCI TELECOMMUNICATIONS CORP., ET AL.,

Intervenors.

On Petition for Review of Orders of the
Federal Communications Commission

JOINT APPENDIX TO THE BRIEFS

VOLUME III

UNITED STATES COURT OF APPEALS
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PETITION FOR RULE MAKING

Microwave Communications, Inc. (MCI), by its attorneys, respectfully petitions the Commission under Section 303(g) of the Communications Act, Section 4 of the Administrative Procedures Act, and Section 1.401 of the Commission's Rules, for the institution of a proceeding looking toward the adoption of rules and the announcement of policy with respect to the above matters. In support of its petition, it shows as follows:

A. MCI'S INTEREST IN THE MATTER

1. The issues we wish to raise here are broad and important ones. What is the essence of common carrier communications service? What are the permissible limits to the uses a common carrier's customers can make of its

facilities? What is the role of the Commission in an area where it has determined that competition among common carriers is in the public interest? Some of these questions have been litigated in the transportation field, and it appears that communications may be moving in the same direction unless the FCC intervenes -- and certainly there is basis for questioning whether the transportation industry represents a pattern that should be followed. We are seeking to protect our own interests, of course, but are also motivated by a desire for orderly communications structure and development, and think we have the same interest as the public in the Commission's being fully able to protect the public's interest in adequate communications at fair and reasonable rates. It is not our purpose to restrict communications; on the contrary, we think we have demonstrated our conviction that the greater the innovation and variety available, the better it is for the users of communications and for the industry itself. But artificial pricing schemes, of the kind which concern us here, are not innovative communications and have hurt, rather than helped, the communications industry and those it serves. MCI is the licensee of a common carrier microwave system between Chicago and St. Louis. It offers a variety of specialized business and data communications services at rates below those heretofore charged by the existing carriers in those cases where they provide comparable services. Since MCI's facilities are especially designed for these kinds of services, its rates reflect the cost savings which result.

2. When the Commission, in Docket No. 18920, concluded that the public interest would be served by authorizing the entry of new specialized carriers in the business and data field, it stated that the existing carriers would be allowed to compete fully and fairly in this expanding new market. It announced that they could abandon nationwide averaging of costs and rates if they chose to do so, and that they could reflect the economies, if any, inherent in their operations. However, the Commission has expressed concern, in recent years, over the danger that the existing carriers may subsidize their competitive services out of the revenues from their monopoly services. When it instituted Docket No. 19129, in January 1971, to consider AT&T's request for the largest increase in interstate rates which it has ever sought, the Commission directed that it would have the burden, in the already pending Private Line Rate Case (Docket No. 18128), of demonstrating that none of its services involved there are cross-subsidized by the users of Message Telecommunications Service (MTS). MCI has expressed concern, in both proceedings, that the existing carriers -- and especially AT&T -- are, indeed, subsidizing the Telpak, Private Line Telephone, Private Line Telegraph, and Series 11,000 service out of its revenues from its monopoly services, MTS and WATS (Wide

Area Telephone Service). These matters have not yet been resolved.

3. The existing carriers have responded to the entry, or threat of entry, of new specialized carrier competition in a number of ways. On December 6, 1971, AT&T filed increased installation and monthly service terminal charges in the Telpak and other private line services which appear to us to be anticompetitive in design and effect and have, therefore, been protested by MCI. More recently, Western Union has filed reduced private line rates for service between Chicago and St. Louis, and has also filed a revised tariff for its Datacom service. MCI has protested both of these. It will continue to oppose what it regards as predatory, anticompetitive practices on the part of the established carriers.

4. Meanwhile, however, a number of other practices have developed which we believe constitute unfair competition and which, if not dealt with promptly and effectively by the Commission, can frustrate its policy decisions in Docket No. 18920. These involve arrangements in which substantial communications capacities are furnished by the existing carriers to individuals, groups of individuals, or business entities of various kinds at low bulk rates. These "customers" then parcel out this communications capacity, in the form of telephone and telegraph channels, to others who allegedly

"share" the costs or who otherwise benefit from prorating the low bulk rates. These practices pose a serious threat to the public, to the FCC in discharging its responsibilities to the public, and to MCI and to the other parties who have applied for special carrier authorizations, by broadening the impact of practices based on the carriers' claims that combining the demands of several users justifies the charging of lower rates per channel than are specified in the carriers' tariffs for small individual users of private line communications. The Commission recently required the termination of one such practice -- Telpak sharing -- on the ground that it was unlawfully discriminatory as against those who were not permitted to share. Telpak, 31 F.C.C. 2d 674, reconsideration denied 32 F.C.C. 2d 619 (1971). The Court of Appeals for the Second Circuit has just affirmed that decision. It appears that AT&T is now trying to achieve comparable results through the devices to which this petition is addressed. Since such practices allow Bell to broaden the application of rates which we believe to be subsidized out of its monopoly revenues, they threaten the initiation of the new competition which the Commission has found to be desirable in the business and data field. We are concerned that it took four and a half years to eliminate the Telpak sharing practice, and are therefore asking the Commission to dispose of the comparable joint-user practices involved here by rule making rather than adjudicatory hearings.

B. THE THREE BASIC FORMS OF SERVICE CONTEMPLATED BY THE COMMISSION

5. The Commission initially recognized two ways in which people could get point-to-point communications service: (1) They could build, or lease, their own private system, operate it themselves, and pay all the maintenance and other expenses; or (2) they could go to a common carrier and buy service at the tariffed rate, thereby avoiding any capital investment or long-term lease commitment and any responsibility for maintenance and operation.

6. Some years ago, however, a third form of operation developed. It occurred to two or more individuals, eligible in the same point-to-point service and operating in the same area, that it was not necessary for each of them to build his own private system. Instead, they could pool their resources, build a single system to serve their combined needs (thereby achieving certain economies), and then share the expenses of operation. The Commission recognized that such arrangements could serve the public interest, but in authorizing them it adopted rules to prevent abuse. Section 93.4, dealing with the Land Transportation Services,

is typical of the provisions for the various services. It reads, in part, as follows:

> §93.4 Cooperative use of fixed radio stations.
>
> (a) Licensees and persons eligible to become licensees of operational fixed stations under this part may make cooperative use of such licensed facilities under the conditions and subject to the limitations specified in this section.
>
> (b) Such licensed facilities may be cooperatively used and shared only by: (1) persons licensed or eligible to be licensed within the same radio service . . .
>
> * * *
>
> [illegible]censed facilities may be cooperatively used under this section only (1) without charge to any of the participants in its use, or (2) on a nonprofit, cost-sharing basis pursuant to a written contract between the parties involved which provides that the licensee shall have control of the licensed facilities and that contributions to capital and operating expenses are accepted only on a cost-sharing nonprofit basis, prorated equitably, among all participants using the facilities, or (3) on a reciprocal basis . . .
>
> (e) Each licensee sharing its facilities under this section shall maintain records showing the cost of the facilities and their operation and use, the charges made to and payment made by each of those using the facilities or contributing to their capital cost or operating expense, and the information specified below, and such records shall be available for inspection by the Commission.
>
> (f) Each licensee sharing its facilities under this section shall file a notification with the Commission 30 days prior to the use of its facilities by any other person . . .
>
> (g) The licensee may institute the service described in the notification filed pursuant to paragraph (f) of this section 30 days after filing unless the Commission during that period notifies the licensee that the information supplied is inadequate or that the proposed service is not authorized under these regulations, and the licensee shall then have the right to amend or to file another notification to remedy the inadequacy or defect and to institute service 30 days thereafter

or at such earlier date as the Commission may set upon finding that the inadequacy or defect has been remedied.

(h) Each licensee sharing its facilities under this section on a nonprofit, cost-sharing basis shall file an annual report with the Commission, using FCC Form 402-A, within 90 days of the close of its fiscal year containing:

> (1) A financial statement of operations during the preceding fiscal year in sufficient detail to show compliance with the requirements of this section;
>
> * * *
>
> (3) A brief statement as to the use of the facilities made by each person sharing the use and an estimate of the approximate percentage of use by each participant during the preceding fiscal year; and
>
> (4) Any change in the items previously reported to the Commission concerning such facilities or their use in the application for the license or in a notification under this section.

* * *

(Emphasis supplied.)

7. Why did the Commission impose these conditions on shared operations? Why didn't it simply let the sharing parties work out any arrangement they please to govern such a system? The Commission recognized that one of the parties to an allegedly "shared" system could, unless restrained in the ways specified in the rules, become a common carrier providing communications to others for profit, but without any authorization from the Commission to engage in such an operation, without a common carrier's obligation to provide service on reasonable demand,

and without being subject to regulation as to his rates, practices, classifications, etc. Two corollaries of this, of course, are (1) that this would permit such a person to conduct a common carrier operation in frequencies allocated for a quite different class of service, and (2) that it would subject duly licensed common carriers to competition which could be unfair and destructive.

8. It appears to us that this new, third form of operation was expected to involve a limited number of sharers. (In Preston Trucking Company. Inc. 31 F.C.C. 2d 766 (1971), the Commission noted that the sharing arrangements it has authorized in the fixed services have involved two, three, or four entities.) This would be a logical development because the requirements as to written agreements, reports to the Commission, and nonprofit operation (meaning a prorata sharing of costs, with no significant surplus to pass to the one who engineered the arrangement) would become more and more burdensome as the number of participants increases.

9. But someone saw a chance to pervert the rules, in both the point-to-point and mobile services, to permit an operation which is indistinguishable from a common carrier service, except that (1) it is carried on without a common carrier authorization; (2) it functions in non-common carrier frequencies; (3) it adopts certain *pro forma* practices in an

attempt to meet the sharing rules; and (4) the details of its operation are not regulated under common carrier principles -- indeed, it is licensed and re-licensed, but otherwise not regulated, by the Commission's Safety and Special Radio Bureau, rather than its Common Carrier Bureau. This form of operation usually involves substantial numbers of "sharers" (really subscribers), who (1) pay fixed rates for service just as they would to a carrier; (2) look to someone else for maintenance, as they would to a carrier; (3) terminate service when they wish, as they could if they dealt with carrier; but (4) have no regulatory authority to whom they can complain if their "carrier" does not deal fairly with them. Instead of all of the parties involved having basic businesses with significant communications needs which can be served through sharing of facilities to their mutual advantage, one of them has nominal, if any, communications needs of his own, and is motivated to enter the arrangement by the desire to derive a profit from the provision of an unlicensed pseudo common carrier service.

10. We have alluded to the pseudo common carrier problem in the private microwave services only because analogous, but more serious, developments seem to be taking place in the common carrier services.[1] We want to make it

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[1] In addition, we think that any sharing of common carrier facilities should be conducted under rules or tariff provisions comparable to Section 93.4, quoted above.

perfectly clear what concerns us, and what does not. We fully agree that users of point-to-point communications should have the choice of going to a common carrier, building a private system of their own, or building a shared private system in compliance with the Commission's rules. And we recognize that there are circumstances in which one can subscribe to common carrier facilities and, quite properly, arrange for others to share in their use -- but, again, these arrangements are subject to abuse. We think we can illustrate the problem by setting forth four modes of operation -- two of which are legitimate and two constitute common carrier operations which should be regulated as such:

(a) Company A is in the business of supplying a non-communications service -- computer time-sharing, burglar alarm protection, background music, credit check service, etc. It finds that it can widen its market, or reduce its costs, if it connects its computer, its warning devices, etc. to potential customers' locations. The customer does not care, for example, whether the computer which services his needs is on his premises or at some remote point to which he is connected by a communications link. He goes to A, not for communications, but for computer service, or whatever it is the Company is in business to provide. The Company charges a price which is designed to yield a profit after recovering all its costs in providing its computer or other service -- including what it pays a common carrier for the lines used to tie its service into its customers' locations. We have no objection to A's purchasing communications and using it as part of the package involved in providing its completely non-communications service. The Commission implicitly approved such arrangements, in the computer field, in its Final Decision and Order in Docket No. 16979, adopted March 10, 1971. However, it is generally agreed that this does not allow A to permit its computer customers to use the common carrier circuits for their own independent, purely communications needs.

(b) Company B has a need for communications between two or more points. It finds that if it subscribes to greater capacity than it needs and arranges for others to use the excess, prorating the cost of the facilities and of putting the group together, it can get the communications it needs at lower cost than if it paid the full cost of the cheapest facility available to it alone. B is simply sharing its actual, direct costs and is not reselling communications for a profit. The Commission approved this kind of arrangement in a letter to

Scantlin Electronics, Inc., which is discussed in the next section. However, strict controls as to the number of joint users, recoupment of costs only, and limited number of circuits allowed are necessary in these cases.

(c) Company C buys circuits and uses them to supply a service which is necessarily dependent on communications -- i.e., it would not be viable without its communications component. For example, a number of enterprises have, in the past, attempted to use common carrier circuits to provide facsimile transmission of documents from one city to another. Their potential customers were not interested simply in producing copies -- they wanted to produce copies at distant points, thereby achieving a communications result similar to sending a telegram or an airmail letter. (This distinguishes the facsimile and computer services because the customer would have been satisfied with having his computer work done on his premises.) In a letter dated April 11, 1969, to Docu-Trans, Inc., and other interested parties, the Chief of the Common Carrier Bureau's Domestic Rates Division ruled that this facsimile service would be a common carrier offering, and that the facsimile company would have to be listed in the tariffs of the interstate carriers as connecting carriers, with their charges reflected in said tariffs. We agree, and feel that parties engaging in operations of this type should be regulated as common carriers.

(d) Company D realizes that it can subscribe to communications capacity from a common carrier, subdivide and resell it to people having normal private line requirements, and make a profit by virtue of the fact that it can exact a charge which exceeds the prorated cost of the sub-channels but is still less than its customers would have to pay the carrier for ordinary private line facilities. This is comparable to Class (c), rather than Classes (a) and (b), because here, again, what D is selling is communications, pure and simple. In a letter to Timeplex, Inc., which is discussed in the next section, the Commission ruled that arranging to add multiplex equipment to a common carrier circuit and selling the derived channels at a profit was a common carrier service for which tariffs would have to be filed.

The first two of these situations involve different, but proper, uses of common carrier facilities because A and B are not motivated by a desire to profit from the resale of communications; but the last two distort the regulatory scheme because C and D are trying to provide interstate communications by wire and radio, and should therefore be regulated as common carriers.

11. For some reason, AT&T seems to be permitting, or even encouraging, the resale of one class of channels -- the bulk facilities provided under its experimental Series 11,000 Service. The result is that private line circuits are made available to certain users at rates much below Bell's regular private line rates -- indeed, at rates so low as to tend to discourage the development of competing services. But before we examine these arrangements, let us consider two rulings issued by the Commission's staff early last year which seem to us to establish a sound policy which should be uniformly applied in this area.

C. SCANTLIN AND TIMEPLEX - THE POLICY AGAINST PROFIT TAKING

12. Early last year, the Commission's Common Carrier Bureau ruled on two cases in which companies had taken channels from AT&T, claiming to have communications needs of their own to justify the arrangement, and had then purported to "share" what they said was excess capacity with others. In a letter to Scantlin Electronics, Inc., dated February 5, 1971, the

Acting Chief of the Common Carrier Bureau noted (1) that the company had a legitimate communications need between California and Hawaii and was leasing one voice grade circuit from a carrier, but did not require its full capacity; (2) that it had interested other organizations, with similar communications needs in sharing the idle capacity; (3) that the charges of the carrier for the one channel would be billed directly to these other users based upon the number of 75 baud channels assigned to them; (4) that each joint user participated in the costs of installation, maintenance, and administration of the multiplex equipment and modems employed in that same proportion; and (5) that Scantlin absorbed the cost associated with any unfilled capacity. He concluded by saying:

> ". . . it is our opinion that you are offering this service as a means of reducing the idle capacity of your existing circuit at rates reflective of the proportional use of the circuit by joint users and without including an element of profit in the calculation of the overhead and maintenance and expenses and are not involved in common carriage subject to the applicable provisions of Title II of the Communications Act." (Emphasis supplied.)

13. However, on the same day he also wrote to Timeplex, Inc. Here he noted that the company proposed to furnish to a customer the use of multiplex equipment to subdivide interstate private line voice channels obtained from an established carrier into telegraph or low speed data channels, with the carrier's charges apportioned between Timeplex's customers with no element of profit to Timeplex. However,

he also noted that Timeplex would make a charge to the customer for the multiplex equipment which was designed to recover its costs, "including an element of profit". He therefore concluded:

> "Since you propose to furnish the aforementioned interstate communication service (i.e. the use of multiplexing equipment) to any financially responsible party at rates designed to recover the costs of such service including an element of profit, it is our opinion that such service would be a common carrier communication service subject to the applicable provisions of Title II of the Communications Act of 1934, as amended." (Emphasis supplied)

As a consequence, he directed that tariffs be filed before any such service could be provided.

14. These two rulings seemed to us to establish a sound and viable test for determining whether an alleged sharing arrangement is a bona fide one, or crosses the dividing line and becomes a common carrier operation which must be

duly tariffed, with the decision turning on whether the excess capacity is actually shared on a legitimate prorated basis, or is resold at a profit.

D. BELL'S COLLUSION IN RESALE OF SERIES 11,000 CHANNEL CAPACITY IN VIOLATION OF ITS TARIFF

15. The same practices have recently cropped up in new forms involving alleged sharing of Bell's Series 11,000 channels, and are subject to the same objections. We think this is true in the case of William F. Hogan Associates, Inc.[2] (Hogan) which, as we understand it, has purchased three or four broadband channels from AT&T under its Series 11,000 tariff. We have examined copies of the recent correspondence about this operation orginated by counsel for the National Retail Merchants Association (NRMA) and believe that it demonstrates the need for the development of new policy in

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[2] The Chief of the Common Carrier Bureau earlier raised questions about such practices in a letter dated August 20, 1970, to Series 11,000, Inc., which is apparently affiliated with Hogan. He pointed out that the introduction of Bell's Series 11,000 channel offering and the revisions in the joint user provisions of Bell's Private Line Tariff "create possibilities of arrangements whereby the customer for the service could act as a common carrier for hire." One of the questions raised was whether the company was expected to realize a profit. As far as we can determine, the matters raised were never fully resolved. This particular exchange of correspondence seems to have terminated with a letter from William I. Schwartz, Vice President of Series 11,000, Inc., dated April 1, 1971. We know of no Commission ruling regarding this correspondence and find no indication that it was ever taken up with AT&T. The service is still being offered, and we think it is subject to the same objections raised here on the basis of the more recent correspondence regarding Hogan itself.

this area.

16. NRMA's counsel has questioned whether Hogan's activities constitute resale of communications in violation of the provisions of Section 2.2.3 of AT&T's Tariff F.C.C. No. 260 covering interstate private line service. He thinks it likely that members of NRMA will be offered service by Hogan, or other "entrepreneurs," and is concerned that they may accept the offer and come to rely on the low circuit costs involved, only to have it determined later that the arrangement is improper. We believe that the operations of Hogan should be classified as an unauthorized offering of communications for hire, and that they are therefore illegal because they violate both the Communications Act and the carrier's tariff.

17. Our concern, of course, is different from that of counsel for NRMA. He does not want members of NRMA to come to depend on communications arrangements which may later be taken away from them, with the kind of disruptive impact being experienced by those who had enjoyed the features of Telpak service which have been found to be illegal (Telpak A and B and Telpak sharing). We do not want others to be able to offer communications service for hire in a form which will compete with MCI and its affiliated carriers, but without undergoing the same regulation to which we are subjected

as licensed carriers, without bearing many of the costs which fall on a common carrier, and in a fashion which permits AT&T to effect the indirect provision of private line service at rates which would be unlawfully discriminatory if offered by the carrier directly. The result would not be fair competition, but predatory anticompetitive conduct which would circumvent the Commission's legal responsibilities under the Communications Act and could defeat the Commission's decision to introduce competition into the business and data market.

17. We have read with interest AT&T's responses to the inquiries stimulated by NRMA counsel's letters. Mr. T.W. Scandlyn, a Bell Assistant Vice President, first replied on September 3, 1971. He pointed out, in part:

> "A portion of the Series 11,000 channel capacity is furnished to Hogan Associates which has *asserted* that such capacity is utilized for communications directly relating to its business. . . .
>
> "*As we understand it*, Hogan Associates provides services to the joint users for which a charge is levied. So long as Hogan Associates is a *bona fide customer* for a portion of each service and so long as its fees represent *reimbursement* for services provided by Hogan Associates and not for the services furnished by the telephone company, we have concluded that the use being made of Series 11,000 service is consistent with the tariff provisions permitting joint use. . . ." (Emphasis supplied.)

Mr. Scandlyn seems very incurious about the particulars of Hogan's operations. He is content to base his "understanding" on Hogan's "assertion," and then sets forth standards which he concludes -- without any independent investigation --

have been satisfactorily met. He must think that the Commission is naive, indeed, if he expects it to believe that he has any real basis for regarding Hogan as a bona fide customer with legitimate communications needs of its own which can benefit from sharing. It must be apparent to him that Mr. Hogan has obtained a second, a third, and now a fourth 240 KHz channel, though it uses only a nominal part of the capacity of each of them. Mr. Scandlyn must know that this arrangement is a sham. He must have seen documents such as Hogan's "Management Report" of June 16, 1970, in which it reported that "Sufficient subscriptions have now been received to justify ordering the second 11,000 super-group facility between New York and Chicago on a direct route basis. We are currently engaged in developing potential requirements for Philadelphia, Pittsburgh, Cleveland and Detroit services out of both New York and Chicago. . . . We hope to be able to announce availability of such new service points at an early date and with further attractive savings to participants."

19. When the matter was pressed further, Mr. Scandlyn continued to confine himself to generalities, indicating no desire to find out whether Hogan, in fact, is violating the tariff. In a further letter, NRMA counsel pointed out that certain organizations which have approached retailers appear to be in the primary business of arranging joint user groups. He also noted that "reimbursement" traditionally means

recoupment of out-of-pocket expenses without including any profit, but that certain of the organizations proposing joint use are approaching retailers with a primary view toward making a profit on the joint user service as such. In a response dated April 7, 1972, Mr. Scandlyn agreed that"the term 'bona fide' is used to mean that the [communications] requirement must be genuine and not feigned or contrived," but doesn't indicate that AT&T has determined this to be true of Hogan. And as to reimbursement, he says only that ". . . any fee which the customer charges a joint user must represent reimbursement, however that term is defined, for services the customer performs and cannot in any way represent payment for services furnished by the Telephone Company under its tariffs." (First emphasis supplied; other in original.) Thus he declines to define "reimbursement" or to verify whether Hogan is in fact simply repaid its expenses in arranging for the shared use of the broadband channels it takes from Bell, or is receiving "a payment or other compensation" for the private line service it has ordered from Bell.

20. Stripped of provisions not here relevant, paragraph 2.2.3 of Bell's Tariff 260 specifies that: "Private line service shall not be used for any purpose for which a payment or other compensation shall be received by either the

customer or any authorized or joint user . . . This provision does not prohibit an arrangement between the customer and the authorized or joint users to share the cost of the private line service. . . ." It seems clear to us that if AT&T were to investigate the full facts surrounding Hogan's operations, it would find that its "customer" (Hogan) is receiving "payment or other compensation" from each "joint user" for the use of this "private line service." We doubt that Hogan is a "bona fide customer with communications requirements relating to its business" -- indeed, we do not think it has any business requiring communications between New York and Chicago other than its business of brokering multiplexed channels derived from Bell's broadband offering. We think it is, therefore, clearly engaged in a resale of communications of the very kind paragraph 2.2.3 purports to prohibit -- and Bell is therefore condoning a violation of its tariff.

21. Mr. Scandlyn recognizes the possibility that a "requirement" for communications could be "feigned or contrived," but shows no sign of having tried to determine whether that is true in this case. His statement that "any fee which the customer charges a joint user must represent reimbursement . . . for services the customer performs and cannot in any way represent payment for services furnished by the Telephone Company" involves a contradiction in terms.

One is not "reimbursed" for services -- he is "paid" for them. On the other hand, it is common usage to refer to "reimbursement" of expenses incurred in achieving some commonly desired end. Thus if Hogan really had significant communications needs and was motivated simply by a desire to accommodate those requirements at the lower channel costs attainable through true sharing, it would be entitled to "reimbursement" of any expenses involved in arranging for the participation of other users. But it would not be entitled to be paid a profit for performing its services, for if it did so, the other users would be making that portion of the payments only because of Hogan's control of access to Bell's broadband facilities as a result of its willingness to go into the business of subscribing to channel capacity in wholesale quantities in order to retail multiplexed subchannels to others for a profit. It would be sheer semantic distortion to argue that its customers are only "reimbursing" Hogan for its services, and that they are not "in any way" making payment for Bell's private line services. If Hogan paid Bell for the Series 11,000 channels and then billed the "joint users" a flat rate per channel which included all its costs in making private line service available to them, plus a profit, it would be clear that it was engaged in reselling Bell's service in violation of paragraph 2.2.3. It and Bell cannot change that result by having Bell send each "joint user" a bill covering its own terminating arrangements, terminals, etc. plus its proportionate share of the broadband channel cost, while Hogan bills each of them for its costs plus a profit. (See Footnote 6 below.) The Commission should adopt explicit rules prohibiting this kind of arrangement since it involves resale of communications masquerading as sharing of costs.[3]

E. OTHER POLICY OBJECTIONS TO SUCH RESALE OF COMMUNICATIONS

22. Quite aside from the fact that Bell is unlawfully permitting a violation of its tariff in the face of repeated inquiries about the practices involved, there are sound policy objections to allowing any departure from a bona fide proration of the costs of shared communications facilities.[4]

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[3] On May 23, 1972, the Commission again wrote to AT&T regarding Hogan's operations, stating that the letter of April 7, 1972, "does not completely respond to the questions raised by Mr. Borghesani." It is odd that it requires repeated probing to elicit the information sought.

[4] MCI does not object to true cost sharing arrangements. Our Tariff No. 1 covering service between Chicago and St. Louis offers single channels to be shared in their entirety by from two to five subscribers (Pars. F 1 A (iii) and F 1 B (iii).) This involves true sharing of the costs of a facility by a limited number of parties, each of whom needs its entire bandwidth part of the time. It is, of course, distinguishable from the form of sharing engaged in by Hogan, Timplex and Scantlin, which all involved multiplexing a channel into sub-channels which are then allotted for the exclusive use of the respective sharing parties.

(1) Such Sharing Is Inconsistent with the Outcome of the Telpak Sharing Case

23. In the Telpak Sharing Case (23 FCC 2d 606, 26 FCC 2d 862, aff'd in part and reversed in part sub nom. American Telephone and Telegraph Co. et al. v. Federal Communications Commission (CA 2, 1971, _____ F 2d _____), the Commission found the Telpak sharing provisions of Bell's Tariff 260 to be unlawfully discriminatory -- a conclusion which the Court of Appeals affirmed. However, the Court reversed the FCC's ruling that AT&T and Western Union should offer universal sharing. In conformity with that ruling, the Commission called on the carriers to eliminate the discrimination it had found to exist. They did so by filing tariff amendments, effective December 12, 1971, which eliminated all Telpak sharing. The result was that those users whose individual needs did not justify subscribing to 60 or 240 voice circuits, in order to get the benefits of the discounted rates provided by the Telpak tariff, were no longer allowed to aggregate their requirements to get these favorable bulk rates. That leaves pending only the questions whether the Telpak rates themselves are unjustifiably discriminatory, or are noncompensatory or involve cross-subsidization by Bell's monopoly services.

24. Despite this outcome in the Telpak Sharing Case,

however, Bell continues to allow a form of sharing in the areas where Series 11,000 service is offered. Hogan has set itself up, in effect, as an adjunct to the Bell System, offering arrangements which permit users, who would otherwise take private line telephone or telegraph service, to combine their requirements and get the benefit of prorating the low cost of a broadband channel. Bell does not offer this opportunity directly because it would encourage or grow into the universal sharing which it has always said would doom any bulk channel offering -- and because such a service would be discriminatory, since it would constitute an offering of private line facilities derived in this way at rates substantially lower than those for ordinary private line service. It is just as unlawful for Bell to achieve this result indirectly through a favored intermediary as it would be for it to act directly.

(2) Such "Sharing" Reduces Bell's Private Line Revenues, Requiring Subsidization of the Service from Its Monopoly Services

25. As we have long contended in Docket No. 18128, we believe that the Series 11,000 rates, even for a single user,[5] are designed to stave off competition, are non-compensatory, and involve subsidization out of Bell's MTS and WATS revenues. This situation is compounded

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[5] So far as we know, there are no such single, legal users.

when these discounted channels are subdivided and provided to small users who would otherwise subscribe for private line telephone or telegraph channels. The monthly mileage rates for a half-duplex 4 KHz private line voice channel for the 712 airline miles between New York and Chicago are $3 for the first 25 miles, $2.10 for the next 75, $1.50 for the next 150, $1.05 for the next 250, and $.75 for each mile over 500 -- or a total of $879 for this route. The rate for a 240 KHz Series 11,000 channel (60 voice channels) is $18 per mile per month, or $12,816 for this route. If the latter sum is divided into separate charges for each of the 60 voice channels, the charge to joint users on a truly shared basis would be $.30 per mile, per channel, or $213.60 for the 712 mile route.[6/] This is only 24.3% of the regular private line rate. The offering of private line service to some users at such a low rate not only discriminates against other users -- or would, if provided by Bell -- but also undercuts the efforts of MCI and other new specialized carriers to establish viable operations which can provide continuing service competitive with AT&T. In fact, Bell's

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[6/] There would, of course, be charges for terminating and multiplexing the broadband channel, but when divided by the mileage between New York and Chicago, these costs would not greatly increase the average rate per mile. The differential from ordinary private line rates -- which is really discrimination -- would still be great. Actually, in early 1972, Series 11,000, Inc. was quoting a monthly rate to $450 which obviously includes a significant profit.

tolerance of arrangement such as those offered by Hogan Associates seems a conscious use of the latter as a tool for predatory pricing which the Telephone Company could never get away with itself. Again, its acquiescence in these practices should be regarded as being just as illegal as the direct offering of such disproportionately priced circuits. If this device sops up just enough business to take the edge off the opportunity for new carriers, without seriously undercutting Bell's normal private line services, it will have achieved the objective of blunting the impact of new entry.

26. Of course, if Bell contents itself with such limited revenues from these "shared" circuits -- as compared to those derived from its normal private line circuits, which most of the "sharers" could be expected to use if the reduced rates were not available -- its overall revenues will be reduced. It is because of such practices that Bell finds itself in a position which, it claims, requires that it be given the largest interstate rate increase it has ever sought, all at the expense of the MTS users! This effort to make up its alleged deficiency in revenue from the customers of its largest monopoly service -- who have nowhere else to go -- aggravates what is, we believe, already a serious cross-subsidization of Bell's competitive services out of its monopoly revenues. That practice is anticompetitive because it weakens the efforts of others

to compete with Bell -- Western Union, manufacturers of private microwave equipment, MCI, or the other specialized carrier applicants -- since they have no comparable base of secure revenues from which to operate. The Commission should adopt rules to prevent such use of pseudo carrier operations in the guise of "shared" cost arrangements to advance Bell's efforts to reinforce and continue its dominance in the business and data markets.

27. The absurdity of the rates made possible through Hogan's misuse of the Series 11,000 tariff is made even clearer if one translates them into charges for MTS use. If Bell could really cover its costs and earn a fair return on the voice circuits at $213.60 per voice channel per month, then it could afford to offer long distance service between New York City and Chicago at approximately three cents per minute.7/ The fact that the company clearly has no intention

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7/ Indeed, it could provide a 3-minute telephone call from New York to Chicago for 9.8 cents, instead of the present charge for an unassisted call between these two points of $1.05 during the daytime and $.50 at night. [The calculation is as follows: Assume the circuit is used 21.66 days per month (the average number of business days, thus ignoring weekends), and for an average of 5 hours on each of those days. This gives a total of 108.3 hours per month, which converts into 2,166 3-minute periods per month. When that is divided into $213.60, it gives 9.8 cents per 3-minute call.] This serves to point up the discriminatory and non-compensatory character of the Series 11,000 rate when it is converted into the kind of use which Hogan's customers make of the facilities. Conversely, if Bell were to use these circuits for switched service at present rates, it would obviously earn much more than it now realizes from devoting them to private line purposes. It should certainly not be of offering MTS at such a low rate[8] argues strongly that it should not be providing private line circuits at this level either. It is simply illogical to accept its claims that these rates are lawful, and the Commission should move promptly to strike them down by adopting rules to prohibit abuse of the "shared cost" concept by unauthorized and unregulated common carriers.

(3) Such "Sharing" Makes It Impossible for the Commission To Discharge Its Regulatory Responsibilities

28. A common carrier -- whether AT&T or MCI -- must get Commission authorization to construct communications facilities (and must pay applications fees in the process), must meet statutory ownership requirements, must provide services

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allowed to increase its MTS rates when it is not making efficient use of its existing facilities to optimize its earnings. If Bell claims that these rates are proper because the New York to Chicago route is a high capacity one, it should be remembered that Series 11,000 service is also offered between much smaller city pairs such as Centralia, Illinois-Evansville, Indiana; Battle Creek-Traverse City, Michigan; and Utica, New York-Scranton, Pennsylvania. See Attachment A, which is Third Revised Page 139.14 from Bell's Tariff F.C.C. No. 260, which lists the terminal locations available.

[8] Such a rate would, of course, generate an enormously increased demand for service, which would further compound Bell's recent difficulties in financing the huge annual additions to its plant which are required even at today's rates. That is simply another reason for feeling certain that the Company could not afford to provide MTS at these rates -- and that, by the same token, it cannot really afford to offer private line service to Hogan's "joint users" at the rates it charges them, except for the fact that it derives competitive advantage from these discounted channels and can make up any short-fall in revenues out of MTS.

on reasonable request, must treat all users in a fair and non-discriminatory manner, must file detailed reports, must respond to subscriber complaints, and must submit to the full panoply of regulation which the Commission has developed over the years. This restricts the carrier's freedom of action and adds to the cost of its operations, but is a fair price to pay for the status it acquires; and it is clearly necessary if protection of the public's interests is to be assured. But none of these obligations or restrictions are imposed on Hogan Associates, or anyone else operating in like manner. Hogan files no applications with the Commission, pays no fees, and submits no reports. It could be foreign-owned without the Commission's knowing it, and it could give some of its "joint users" preferred treatment, so long as the total payments to Bell were in the right amount. It could refuse service to some who would like to take advantage of the low costs made possible by its arrangements. It would not be subject to orders of the Commission. Indeed, neither its operations nor its relations with Bell would be subject to Commission supervision and regulation if it is a bona fide "customer" for the Series 11,000 channels for which it subscribes and if its customers are deemed to be legitimate joint users.

29. But to state this proposition is to demonstrate that it cannot be tolerated. Congress has established a

detailed regulatory scheme to govern communications common carriers and has created the Commission to implement it. The Commission cannot allow even a small, though potentially much larger, part of the common carrier industry to evade all effective regulation. Nor can it turn "regulation" of this portion over to AT&T, since the latter has interests which can be served through the indirect provision of cheap, unregulated communications service. The Commission must adopt rules barring such operations or, at the very least, require Hogan and all similar operators to qualify and function as common carriers, subject to its regulatory control.

(4) Such "Sharing," If Valid Domestically, Could Be Extended to the International Field, with Disastrous Results

30. If operations like those of Hogan Associates are valid domestically, then similar arrangements could presumably be permitted in the field of international record communications -- at least if Bell adopted comparable provisions in its overseas tariffs. But if a third party pseudo carrier could take voice channels, break them down into telegraph or other narrow band channels, and "share" these facilities with others at the low rates this would make possible, then the existing record carriers would suddenly find themselves non-competitive. Bell cannot do this directly, under present Commission policies, but if

a pseudo carrier is regarded as a bona fide customer and if Hogan's method of operation is a valid form of sharing, then the same result can be achieved indirectly. This would be intolerable, so the Commission can -- if it has not already done so -- bar such arrangements in the international field. But if this is true internationally, it should be true domestically. The Commission has long worked to foster competition internationally. Having decided to authorize competition in the domestic business and data market, it should adopt similar pro-competitive policies there, too.

(5) Such "Sharing" Could Operate To Reduce Competition Among Suppliers of Communications Equipment

31. If such purported "sharing" operations are valid, then they could be employed by large suppliers of communications equipment to gain an unfair advantage over their competitors. For example, it has been reported that RCA Corporation is considering establishing a shared-use network employing private line circuits leased by it from AT&T.[9] The Company is knowledgeable in communications matters and has very substantial resources. If it is allowed to put together a

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[9] We have filed a separate letter dated May 30, 1972, to Mr. Kelley E. Griffith, Chief of the Common Carrier Bureau's Domestic Rates Division, with respect to his letter of April 28, 1972, to RCA's counsel concerning the RCA plan. We incorporate that document herein by this reference.

shared-use system which it designs, implements, operates, maintains, and for which it attracts users, then it would be entirely possible for it to make this entire complex a captive market for any communications gear or terminal equipment which it now manufactures, or may manufactures at some future time.

32. If the parties who might be persuaded to participate in such a "joint user" operation were to subscribe directly to Bell's private line facilities, they would be free, under the Carterfone case, to use any terminal or auxiliary equipment they choose, so long as it does not imperil the telephone network. But if RCA's putative operation is not treated as a common carrier, Carterfone would not apply. RCA could condition participation in the system on use of its own equipment. It might even sweeten the "shared use" pot by subsidizing the communications aspects of the operation, in the knowledge that it could more than make this up in equipment charges, which are not so directly comparable or capable of verification. This would confront the Commission with a new and difficult form of cross-subsidy, when it is still trying to develop means for combating the versions already in use. All RCA proposes to do is to equip, manage, sell, and maintain a network of communications channels. But what else does a common carrier do? To claim that the facilities leased from Bell are to be shared on a non-profit basis, with all of RCA's profit coming

from equipment, maintenance, etc. would be sheer pretence. Its customers will come to RCA for communications, period. They will not buy one element without the other. That this would constitute an unlawful common carrier operation is evident from the fact that Bell's offering of clearly comparable service is, of course, regulated as a common carrier offering. To avoid such further complications, the Commission should adopt precise and effective rules to bar resale or brokerage of communications service under the guise of cost sharing, or any other hybrid arrangement which permits third parties to package and dispose of Bell private line facilities at a profit.

F. EXPANSION OF THE "SINGLE USER" CONCEPT WOULD PRODUCE EQUALLY MISCHIEVOUS RESULTS

33. We have devoted primary attention to the dangers posed by unregulated pseudo carriers promoting so-called "shared" use of Bell facilities because some such operations now exist, others are in the offing, and they can seriously undercut and impair free competition. But there is another concept which has recently been proposed and which has equally serious implications. This involves proposed expansion of the "single user" concept which has long been applied to Arinc, the entity which provides communications service to the nation's air carriers (see par. 2.2.1 (G) of Bell's Tariff No. 260).

The American Trucking Association, for one, has strongly urged AT&T and the Commission to accord it such treatment, and if it is successful in this effort, many other associations and groups will follow the same course.

34. Whatever the basis for the treatment historically accorded to Arinc, we think that to extend this special status to a wide range of industry associations whose members have communications needs would be contrary to the Commission's Telpak Sharing decision, would make a shambles of proper cost and rate making principles, and would cripple the new competition the Commission has decided to establish in the business and data field, since obviously every private line user in the United States would find some means of qualifying for the lowest available rate. This could only be done at illegal, non-compensatory rates. In the Telpak Sharing case, the Commission found that it was unlawfully discriminatory to allow entities in the trucking, railroad, and other favored industries to combine their communications needs in order to qualify for the benefits of Telpak service, while their counterparts in other industries (aerospace, retailing, publishing, etc.) were denied this privilege and therefore barred from Telpak's bulk rates -- unless their individual communications requirements were large enough to qualify them. When the Commission directed the carriers to remedy

this discrimination, they elected to eliminate sharing completely. This put the truckers and the others who had enjoyed the sharing provision for years on the same footing as those who had been excluded from sharing all along.

35. While we can sympathize with the concern of those who previously enjoyed the benefits of sharing and who are now faced with increased communications costs, it must be remembered that all that has happened is that they have lost an unlawful advantage after a full hearing and in accordance wi the decisions of the Commission and the Court of Appeals. It would be anomalous --indeed, it would be unpardonable -- if they were now to be allowed to regain this unlawful preference by some rejiggering of definitions. After the Commission has spent several years in getting rid of Telpak sharing, it would be inexcusable if it were to turn its back on all that and sanction the sharing practices in a slightly different form.

36. After all, the Telpak rates themselves have been in litigation for some eleven years -- and have been increased three times during that period -- but the Commission has not yet found them lawful even as applied to the United States as a user of communications, or to other companies whose individual requirements permit them to take advantage of the discounts involved. It therefore makes no sense to permit

extension of these dubious -- and we think unlawful -- rates to dozens and perhaps hundreds of smaller users through any arrangement which allows them to aggregate their communications needs in order to achieve the volumes required for Telpak. Any such misguided effort would seriously undermine the chances of developing healthy competition in the growing market for business and data communications. All such bulk rate plans violate sound costing principles and permit predatory pricing. The Commission should adopt rules or policies which contain, and eventually eliminate, all such practices. It follows, *a fortiori*, that the Commission should reject all attempts to proliferate such schemes in the form of "single user" treatment or any other device having the same purpose and effect.[10]

G. THE DANGER TO COMPETITION IS REAL AND THE COMMISSION, WHILE IT CONSIDERS THE RULES AND POLICIES TO BE ADOPTED IN THIS AREA, SHOULD TAKE STEPS TO MAINTAIN THE STATUS QUO

37. Hogan Associates (and/or Series 11,000, Inc.) has been operating for some time, and was still advertising in order to expand its "business" as recently as February

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[10] It is certainly not necessary for us to defend Bell's revenues, but we assume that its aversion to universal Telpak sharing indicates that such a broadened application of the practice would seriously impair its revenues -- and the same thing would be true of any extension of the "single user" concept.

1972.[11] Other shared-user systems have been studied and widely discussed, and now seem on the verge of implementation. The elimination of Telpak Sharing has given impetus to strong efforts to get favored "single user" treatment. If these practices expand -- even during the period the Commission will require to formulate and adopt rules to deal with these problems -- the consequences to the new competition the Commission is trying to encourage could be serious. It is therefore of the utmost urgency that the Commission maintain the status quo during its consideration of these matters. It should take final action as quickly as it can but, meanwhile, should impose a freeze on new joint user schemes, new resale devices, new pseudo carrier operations -- even the addition of new customers to existing arrangements -- and should make it clear that it will not grant new "single user" status to anyone. Only in this way can the Commission insure that matters will not deteriorate while it goes through the steps necessary to develop sound and comprehensive policy in these critical areas.

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[11] See Attachment B, a Xerox copy of an advertisement run by Hogan's affiliate, Series 11,000,Inc., in Computerworld for February 23, 1972. This apparently involves Bell in a conscious violation of its tariff. Section 2.4.3(D)(2) of its Tariff F.C.C. No. 260 provides that Series 11,000 channels are furnished only for a minimum initial service period of 12 months and requires 12 months notice of termination. But Section 3.2.11 recognizes that Series 11,000 service expires on November 1, 1972, and on April 19, 1972, Robert J. Maher, Sales Project Supervisor, AT&T, in a speech before the Petroleum Industry Electrical Association, said that "as yet no decision has been reached as to whether this offering will be continued in its present limited scope, expanded nationwide or terminated." With matters in this status, how can Bell be connecting up new users of the service when it has less than the specified term to run and no decision has been made even to request its extension.

H. CONCLUSION

38. We agree that true sharing of communications facilities is a legitimate way for users to obtain reduced costs, so long as no one converts the process into a business for profit. However, we think the threat to fair and effective competition posed by the various means, discussed above, of deriving unreasonably low and discriminatory rates is a serious one. We therefore ask the Commission to:

(a) Construe Paragraph 2.2.3 of Bell's Tariff F.C.C. No. 260 as permitting only straight sharing of private line facilities costs, plus sharing the legitimate costs of effecting the arrangement, but barring any kind of "sharing" arrangement which results in the opportunity for one of the participants to make a profit;

(b) Ascertain the true facts concerning the operations of William F. Hogan Associates, Inc. and/or Series 11,000, Inc. with particular reference to:

(1) Whether it is engaged in a business (other than arranging for the sharing of broadband channels leased from AT&T) having significant communications needs between New York City and Chicago;

(2) The extent of any such communications need and its relationship to the facilities leased from Bell (i.e., is its need so great as to justify the leasing of an

additional Series 11,000 channel, or could it be accommodated in the first such channel and is its need continuing to expand in such a way as to require it to continue to find additional "sharers" to use surplus capacity);

(3) The nature of the efforts made by Hogan in implementing the "sharing" arrangement, the costs incurred in connection with those efforts (with particular attention to costs of advertising to attract additional sharers), the methods used to obtain reimbursement of those costs, and whether or not Hogan derives a profit from the operation;

(4) Whether Hogan is still offering, with Bell's tacit approval, a service which is scheduled to expire before the minimum service period specified for the service.

(5) Whether AT&T has acted illegally, in violation of its tariff, in permitting Hogan to continue to sell its service, in view of the scheduled termination of Series 11,000.

Having explored these matters, the Commission should rule on whether or not Hogan's (Series 11,000, Inc.'s) operations comply with Bell's tariff, as construed above, and issue whatever orders may be appropriate;

(c) Issue a policy statement to the effect that third parties who intervene to lease common carrier facilities, multiplex them, and resell the derived channels to others for a profit are common carriers and cannot engage in such operations without first obtaining a certificate of public convenience and necessity under Section 214 of the Communications Act, and that their provision of communications service at rates discounted substantially below the carrier's charges for comparable service poses serious questions as to cost justification and discriminatory, anti-competitive pricing which could imperil the Commission's policy decisions in Docket No. 18920 and otherwise disserve the public interest;

(d) Initiate rule making proceedings looking toward the adoption of a rule which would spell out procedures to be followed, and standards to be met, by bona fide sharers of the cost of communications facilities in terms similar to those of Section 93.4 of the Rules quoted above;

(e) Initiate rule making procedures looking toward the adoption of a rule reading as follows:

> Any person proposing to lease interstate private line facilities from a common carrier, subdivide their channel capacity, and release or resell at a profit, the communications capacity as such (i.e., without the addition of another service such as data processing, security surveillance, background music, etc.) shall first file an application with the Commission for authority to do so, in accordance with Section 214 of the Communications Act of 1934, as amended, and, if authority is granted, shall be deemed a common carrier fully subject to the provisions of Title II of the Act;

(f) Reject any pending or future requests for extension of the "single user" concept to trade associations or other groupings of users of communications;

(g) Pending completion of the above actions, issue an immediate announcement that no carrier shall allow the initiation of new "sharing" arrangements or the addition of new "joint users" to existing plans until the Commission has concluded its consideration of these matters.

We are not trying to restrict communications options or avoid fair competition. In the past, the available choices have been too limited and rigid. We believe that added variety will help everyone -- users and communications enterprises alike. We have urged opening up the higher frequencies; we have consistently recognized private microwave as a valid alternative and endorsed the rule making to authorize reciprocal use of such systems; we have never challenged proper sharing of private or common carrier facilities on a non-profit basis; we believe that those selling non-communications services should have broad latitude to include communications links in the packages they offer; and we intend to make available innovative uses of communications and welcome the efforts of others in that direction. But we cannot stand by and allow the development of pseudo carriers for profit which seek to evade and subvert the regulatory scheme. These arrangements do not involve innovative uses of communications, but are simply artificial devices to get discriminatory, subsidized prices for conventional usage for favored customers and to allow the Bell System indirectly to achieve anticompetitive results which it could not accomplish directly. It is to assure variety and choice and to promote real competition that the Commission must take the steps set forth above.

1730 M Street, N.W.
Washington, D.C. 20036

June 13, 1972

ATTACHMENT A

PRIVATE LINE SERVICE

3. CHANNELS (Cont'd)

3.2 Classification and Rates (Cont'd)

3.2.11 Series 11000 Channels (Cont'd)
(Expires with November 1, 1972, unless sooner canceled, changed or extended) (T)

(A) Types and Description (Cont'd)

(1) General Description (Cont'd)
Individual wideband or voice grade channels established under this series may be connected as specified in (A)(4) Connecting Arrangements and (B)(1) Regulations following.

Channels under this offering are furnished for interstate service twenty-four hours a day, seven days a week and will be terminated only at the premises of customers or authorized users or joint users. Series 11000 channels are furnished for service as specified in 2.4.3 preceding.

(2) Supergroup Channels and Terminating Arrangements

(a) Type 11240 Intercity Channels

Channels having a carrier bandwidth capacity of 240 kHz are furnished between the terminal locations specified below. The Telephone Company, at the customer's request, will arrange these channels for use as either a single wideband channel which utilizes the full bandwidth, or a number of wideband channels of lesser capacity (within the limits specified in (2)(b) and (c) following) or up to 60 voice grade channels, or a combination of wideband and voice grade channels. When wideband data and facsimile transmission channels of less than the full capacity of a Type 11240 channel are provided they may be arranged for alternate use as voice grade channels.

Terminal Locations

Illinois

Centralia
Chicago
Champaign
Peoria
Rockford
Springfield

Indiana

Evansville
Indianapolis
South Bend

Michigan

Battle Creek
Detroit
Flint
Grand Rapids
Jackson
Kalamazoo
Lansing
Plymouth
Traverse City

New Jersey

Atlantic City
Camden
Newark
New Brunswick
Rochelle Park
Trenton

New York

Albany
Binghamton
Buffalo
Hempstead
New York
Poughkeepsie
Syracuse
Utica
White Plains

Ohio

Akron
Canton
Cincinnati
Cleveland
Columbus
Dayton
Toledo
Youngstown

Pennsylvania

Allentown
Harrisburg
Philadelphia
Pittsburgh
Scranton
Wayne

ATTACHMENT B

470

Phone-less DAA Saves on Bill

By Ronald A. Frank
Of the CW Staff

HARTFORD, Conn. – Some users of automatic Data Access Arrangements (DAAs) can get a reduction on their telephone bill thanks to a new tariff recently instituted by the Southern New England Telephone Co. (Snet).

Up to now installations with customer-supplied modems have had to include the price of a telephone as part of an automatic DAA installation. But non-carrier data equipment with automatic-answer capability usually operates without a telephone. In such applications, a central site may automatically poll remote locations, activating the automatic data sets. Time-sharing users might also benefit.

Although the Snet tariff is now limited to one Bell System operating company, an AT&T spokesman described it as "an experiment" that could be expanded if more data users indicate a need.

The Snet tariff provides a lower rate for "unattended sending and receiving" installations. The savings amounts to $1.10 per line each month. For example, an automatic CBS type DAA costs $5.45/mo. Without the telephone, the new rate drops to $4.35/mo.

Users operating automatic answer data networks might save the monthly cost of a phone at each installation if the new tariff is applied on an interstate basis. "Present D A [interstate] tariffs do not provide for a reduced rate when a telephone is not provided," an FCC staff spokesman said. But a request for such a service reduction would probably be given careful consideration, he added.

Communications

Interconnection Issue

Naruc Opposes FCC Work

WASHINGTON, D.C. – The National Association of Regulatory Utility Commissioners (Naruc) told an FCC study committee on interconnection that "the vigorous pursuit by the FCC staff of a liberalized interconnection policy to "benefit big users and manufacturers represents an atrocious misuse of governmental resources."

The FCC study committee is working to develop certification standards for PBX equipment, but the organization's statements on interconnection could affect all classes of non-carrier devices. The Naruc opposition to FCC-sponsored standards for the interconnection of customer-provided equipment is believed to be part of a campaign to have each state regulatory agency deal separately with interconnection issues.

The Naruc letter said liberalized interconnection will lead to a "bureaucratic jungle" and added that the certification of customer-provided equipment "is beyond the lawful authority of the FCC."

In a related move, the New York Public Service Commission (PSC) told the FCC, in a letter, that revenue losses from the increased use of customer-provided equipment "may increase" intrastate phone rates.

The New York letter is significant because the PSC is currently considering a final decision on a proposal by the Rochester Telephone Corp. to simplify the interconnection of non-carrier data equipment users.

Unusual Usage No Emergency, Calif. PUC Says

SAN FRANCISCO – Unusual telephone usage, either by data communications or other users, does not now "pose an emergency situation in California," according to the State Public Utilities Commission (PUC).

While additional studies will be undertaken, the PUC found no reason to approve a proposal to levy a timed Data Exchange Service rate on all time-sharing and other data calls made within the state. The PUC ordered the Pacific Telephone & Telegraph Co. (PT&T) to conduct additional "comprehensive studies" to determine wh[illegible] any phone service problems [illegible] result of unusual usage fro[illegible] data or other users.

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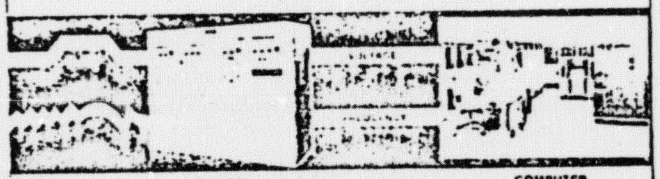

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REPLY COMMENTS

William F. Hogan Associates, Inc. ("Hogan") hereby respectfully presents its reply comments to the Microwave Communications, Inc.'s ("MCI") petition for rule-making, as captioned above, filed on June 13, 1972. On September 18, 1972, Hogan requested an extension of time within which to file comments on this petition. This request was granted by order of the Chief, Common Carrier Bureau in order to allow Hogan to comment on paragraphs 15-21 of the MCI Petition which deal specifically with Hogan's role as a primary customer of AT&T's Series 11,000 offering.

I. Preliminary Statement

In recent weeks Hogan has actively urged the Commission to request AT&T to grant a six to nine-month extension of the Series 11,000 offering; and therefore Hogan's views on the market potential and benefits of the Series 11,000 concept are well known to the Commission.

In its letters of September 21, 1972 and October 19, 1972 to the Chief, Common Carrier Bureau, Hogan has argued that the Series 11,000 offering, in spite of restrictions inherent in the experimental tariff and poor program planning by AT&T, has proved the need for continued broadband, shared services, and that therefore the results of the Series 11,000 experiment should be closely assessed by all interested parties. In these comments, therefore, Hogan will specifically address itself to MCI's unfounded allegations about the nature of its business and its role as a Series 11,000 "customer."

In its Petition for Rule-making, MCI alleged, not on the basis of any direct evidence, that Hogan has engaged in illegal resale of communications services in violation of Section 2.2.3 of AT&T Tariff FCC No. 260. MCI's fragile case is constructed of hearsay, surmise, and irresponsible allegations arising primarily from MCI's competitive anxieties being literally read into (Petition, ¶ 17-22) correspondence between AT&T and the Commission concerning Series 11,000 users including Hogan. MCI's Petition and counsel for the National Retail Merchants Association ("NRMA") in a series of letters to the Commission and AT&T have raised two questions about Hogan's role: (1) whether Hogan is a bona fide customer for a portion of each service, and (2) whether its fees represent reimbursement of services provided by Hogan and not for services furnished by the telephone company. These comments are intended to show Hogan has complied in all respects with the tariff provisions applied to the Series 11,000 offering but should not be interpreted as support for these requirements as a matter of regulatory policy.

II. Hogan is a Bona Fide Customer Under the Resale Provisions of AT&T Tariff 260.

First, as to the nature of Hogan's communications requirements for its Series 11,000 circuit, Hogan has been engaged as a data processing and communications consultant for the past 26 years and has had communications requirements in the Chicago market, as one example, which long preceded the initiation of the Series 11,000 service in November 1969.

The following discussion of Hogan's specific business activities is intended only to demonstrate clearly on the record that contrary to MCI's and NRMA's allegations, Hogan has a substantial independent communications requirement of its own and has not become a customer for the purpose of "profiting" on resale of AT&T's lines.

Hogan's long standing communications requirement between its Scarsdale, New York office and the Chicago area are as follows: One of Hogan's Series 11,000 channels is connected with the Chicago Board of Trade for which Hogan has served as a communications consultant since 1948. As the manager of the Board's ticker system, Hogan has been responsible for determining its communication system's requirements, placing facilities orders and handling other administrative problems which require continual communications between Hogan and his client. Another New York to Chicago Series 11,000 channel leased by Hogan terminates in the Chicago Merchantile Exchange for which, since 1954, Hogan has served as manager of its ticker system. In this capacity Hogan plans facilities, places orders as well as bills subscribers and collects for the service. A third of Hogan's Series 11,000 channels terminate in the facilities of the Trans-Lux Corporation with which Hogan is engaged in a joint venture company known as the Translux Supply Corporation. This company leases projection equipment and various other types of communication equipment including closed circuit video facilities and display tickers. As manager of this corporation, Hogan engages in billing and collection and coordinates the delivery and pick-up services for users of the service.

Hogan's two other Series 11,000 channels connect Hogan's offices in Scarsdale, New York with those of the Pioneer Electronics and Research Corporation in Forest Park, Illinois, a company with which Hogan has worked for the past four to five years in developing a device, patented by Hogan, for the measurement of communications facilities usage and destination. Although these circuits are currently being used for administrative purposes. Hogan is intending to test the use of this device, called a Toll Message Data Device (TMDD), over its circuits. Hogan expects the full technical development of the TMDD which even further enhances its communications requirements. The device, which is integrally related to Hogan's role as a communications consultant for major corporations, will eventually operate to record the destination and duration of every use of a customer's communications system. This data will be stored for return over communications lines to a central processing computer located at or near Hogan's Scarsdale, New York offices.

MCI has attempted further to argue that because Hogan has used only a portion of the capacity of each of its Series 11,000 pipes that its communications requirements are clearly a "sham."

(Petition at p. 21). However, AT&T Tariff 260 does not specify that any minimum amount of capacity be leased in each channel to qualify a user as a customer under the tariff. There are, moreover, sound technical and operational reasons for spreading private line requirements over several different "pipes." In the event of breakdowns, users of circuits are protected against total loss of service. It has been Hogan's practice for this reason to divide not only its own but its users' communications requirements over several pipes whenever possible.

III. Hogan Has Been Reimbursed by Series 11,000 Joint Users Only For Its Management Services and Has Received No Profit From the Sale of Communications Service.

MCI has also asserted without attempting any direct inquiry itself that an investigation by AT&T of "the full facts surrounding Hogan's operation," would reveal Hogan "is receiving 'payment or other compensation' for the use of this 'private line service.'" (Petition at ¶ 20). Before leveling its allegations MCI has apparently made no effort to find out the facts.

MCI concedes that whether Hogan is "entitled", as MCI puts it (Petition, ¶ 21), to reimbursement for services depends on whether, as the customer for the Series 11,000, Hogan had an independent communications requirement:

> "Thus if Hogan really had significant communications needs and was motivated simply by a desire to accommodate those requirements at the lower channel costs attainable through true sharing, it would be entitled to 'reimbursement' of any expenses involved in arranging for participation of other users."

Hogan assumes, therefore, that MCI's contentions about Hogan's "illegal resale" stem from MCI's lack of knowledge -- or failure to inform itself -- about the nature of Hogan's business and its communications requirements. Nevertheless, Hogan wishes to make absolutely clear on the record of this proceeding precisely how it has billed and managed its Series 11,000 channels.

Hogan has never accepted a bill from AT&T and then rebilled its joint users "a flat rate per channel" as MCI alleges in its Petition (at p. 24). Instead, each month Hogan submits to AT&T a pro-rata allocation of usage of the joint use segment of Series 11,000 tariff including its own channel usage. The joint use portion of the tariff includes mileage charges for the interexchange channels as well as charges for the Supergroup and Group terminals located in AT&T's central offices at each end of the leased line. AT&T then submits a bill to each joint user which includes the individual user's charges for local loops, data sets, line conditioning and any other individualized services requested by the joint user. Thus, Hogan fully allocates all costs to each user including itself.

On the cost basis of the joint use line segment and the minimum local loop charge -- excluding any additional mileage charges for connection to sites beyond 25 miles -- Hogan assesses its flat eight percent management fee. This fee covers Hogan's costs in providing the following management services to the other joint users:

-- The customer places the orders of all joint users for facilities or requests for service charges. It also coordinates the joint user's planning for future services.

-- The customer handles the out of the ordinary technical and service problems through its Series 11,000 Long Lines representatives.

The individual joint users are alleviated this responsibility.

-- The customer audits the actual usage of facilities by each joint user and presents the allocation formula to AT&T as well on a monthly basis.

-- The customer also acts as the agent of other joint users in establishing arrangements for others to share the facilities. This is a service substantially beneficial to the joint users since their fully allocated share of costs is reduced by the adoption of the service by new users. Even MCI recognizes in its Petition (at p. 24) that reimbursement of expenses "in arranging for the participation of other users" is appropriately included in a management fee.

-- The "customer" is legally liable for the full lease charges of the service. Therefore some portion of the fee covers incidental collection costs for bills as well as some allocation of cost to reflect the risk of default by users.

Hogan states categorically that it does not engage in any of the following practices, as implied by the MCI Petition: (1) Rebilling of customers based on flat fees not reflecting allocation of actual usage; and (2) cross-subsidization of its own communications costs in its pricing of the service.

Hogan objects strenuously to implication in MCI's pleading that Hogan's pricing includes a profit on the Series 11,000 communications channels. The most specific reference to such alleged practices in footnote 6 of MCI's pleading (at p. 28) clearly reveals MCI's ignorance of Hogan's operations as a Series 11,000 customer or, perhaps worse, its unwillingness to learn the facts before condemning Hogan's activities.

MCI asserts in this footnote that since channels between New York and Chicago were being offered at a monthly rate of $450, Hogan was clearly profiting from its participation in the Series 11,000. However, such monthly charges without any reference to the number of joint user channels in operation provides no basis for determining whether a profit is being charged. Obviously, joint users may pay in excess of the per channel cost of fully loaded Supergroups if facilities are only partially utilized. But the excess of this price over the allocated per channel, fully-loaded price does not represent a profit. No customer can be expected to subsidize joint users on the basis of the rate of fully allocated channels. The customer, like the joint users, shares equally the risk of less than full channel utilization. Of course, if the customer did not allocate costs on the basis of usage and charged a flat monthly rate, a profit would be generated. But Hogan has unequivocally stated that such was not -- and is not -- its practice. The only situation in which Hogan states a fixed rate is during the period when the viability of a joint use arrangement is being determined. For example, Hogan might ask potential joint users if they would agree to lease service at a monthly rate of at least $450 per month, for example, provided that a minimum number of other users agreed to this rate. Each user fully understands, however, that this rate is not fixed but will be reduced with increasing utilization of the Series 11,000 Supergroup.

Finally, Hogan wishes to correct one further mischaracterization of its activities as AT&T's customers for Series 11,000 circuits by MCI. MCI suggests (at p. 23) that Hogan provided "multiplex" services to its users. If MCI intended to imply that Hogan was engaged in this activity, it is evidently misinformed not only about Hogan's activities but also about the nature of the Series 11,000 tariff. Under the tariff multiplexing is accomplished by AT&T with its own facilities. Thus, unlike the Timplex situation in paragraphs 12-15 of the MCI Petition, Hogan offers no communications service for hire but instead acts as a broker and manager of the joint users channels.

IV. Notwithstanding Hogan's Full Compliance With The Resale Provisions of AT&T Tariff, Hogan Believes That Liberalization of These Tariff Restrictions is Both Feasible and Desirable.

The preceding discussion demonstrates conclusively that Hogan has complied in full with the resale provisions of AT&T Tariff 260. Hogan agrees with other parties filing comments in response to MCI's Petition such as GT&E Service Corporation and the Service Bureau that the rationale for continuing these particular restrictions should be closely examined. Hogan does not endorse the proposition that brokerage of communications facilities should be an unregulated activity. It does strongly question whether full common carrier regulation is either required as a matter of law or desirable from a policy standpoint. For unduly burdensome regulation may hinder the emergence of "communications service companys" as intermediaries between the carriers and the users of communications service. Provided that "bulk rates" to brokers are compensatory and that interconnection between the Bell system and specialized carriers is facilitated, these new service companies could in the long term stimulate the growth of the specialized carriers. Hogan therefore briefly outlines its views on the appropriate future of regulation of brokers with the expectation that MCI will not lose sight of potential benefits to its interests in these developments.

1. The communications broker may offer services in the communications industry comparable to those provided by freight forwarders in the shipping and transportation industries. A role for an intermediary between the carriers and ultimate users is emerging because increasing competition in the communications industry has multiplied a user's option in terminal equipment and service offerings. The days of one-stop communications service from the business office of the telephone company are gone forever. An intermediary service company may acquire blocks of spectrum capacity from a carrier and "package" it precisely according to the kind and amount of data communications capacity needed by a user. Currently, AT&T offers only a "small" voice grade and "large" wide band "package". If the broadband shared Series 11,000 service terminates and no alternate service is made available, users will be confronted with little choice and flexibility to meet their data communications needs." Thus, the broker can assist the carrier in marketing services, encourage more efficient channel utilization, promote the efficient meshing of lines, terminal equipment software individualized to each user's need. These tasks are both more complex, demanding, and ever necessary to communications users than MCI concedes in its Petition for Rule-making.

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*/ In its October 19, 1972 letter to the Chief, Common Carrier Bureau, Hogan has argued the short-term and temporary nature of the Series 11,000 offering has not provided incentives for significant investments in programming, facilities, and organization of management information systems necessary before any significant market for broadband data channels can develop.

2. Full common carrier regulation is not required as a matter of law. As the comments of the GT&E Service Corporation point out, the history of regulation of freight forwarders under the Interstate Commerce Act shows that "carrier status" was sought by the forwarder to secure carrier-to-carrier contract rates and did not result from judicial interpretations imposing such regulation. The option to classify communications brokers as "carriers" or "customers" therefore appropriately turns on policy considerations and is not dictated by common law precedent or by the requirements of the Communications Act.

3. Most regulatory objectives of the Communications Act, Hogan believes, can be achieved with respect to resale without the full-scale common carrier regulation urged by MCI. Many of the marketing practices about which MCI complains in its Petition can be controlled through the competitive forces in the market place. Assuming that a broker's ability to enter the market by leasing facilities from either AT&T or a specialized carrier is not arbitrarily restricted, market pressures will provide both minimum and maximum price regulation even without the filing of a tariff. For example, a broker will not sell at so-called "predatory prices" below the bulk price at which services are obtained from the carrier. An upper price ceiling will be imposed by the willingness of competing brokers to undercut higher priced offerings. In fact, profit-taking on resale by brokers is highly likely to be limited by competition to the extent that brokers will

recover only their costs of managing the service.

4. MCI's concern about predatory pricing and the use of brokers for anti-competitive purposes in its Petition may be well founded to the extent that the carrier-to-broker rates may involve cross-subsidization of AT&T's monopoly services (MCI Reply Comments at p. 9). While MCI has a legitimate interest in controlling unfair competition, MCI's approach of shutting off brokerage arrangements through restrictive regulation of resale provides the wrong solution to the right problem. The infant brokerage or communications service industry is being thrown out with the bath. In the process of trying to prevent carrier cross-subsidization and predatory pricing, MCI is stifling the users' options to benefit from more flexible communications services and the importance of preventing unfair competition since it is in the interest of those who favor liberalized resale provisions to see MCI and other specialized carriers as strong viable competitors of AT&T.

4. MCI's recommended policy of cooperative joint use sharing (Petition pp. 6-11, p. 41) may be appropriate to promote and protect such arrangements on private systems but is unnecessary where common carrier facilities are utilized. The Commission's policies requiring only cost allocated cooperative sharing under §93.4 dealing with Land Transportation services referred to in ¶ 6 of the Petition are intended to protect joint users on a private system with limited competitive alternatives from being exploited by the major customers. However, where capacity is leased from a public carrier and facilities are more widely available, a discriminated against joint user can find another broker or customer with which to affiliate. This option

is not available on private systems. Further, MCI should realize that brokers, if restricted to offering services on a non-profit basis as proposed by MCI, would have no incentive to engage in a business activity important to users as indicated above.

5. Unreasonable restrictions on resale imposed by AT&T or MCI in the long perspective must be viewed as a restraint of trade, as a barrier to the emergency of an important new sector of communications industry oriented toward offering both a technical and operational interface between carriers and customers in the increasingly complex field of data communications. In the long run, MCI's interest is in encouraging -- not deterring -- the emergence of communications intermediaries since MCI can respond effectively to users' needs and establish a significant share of the data communications market by working with the broker-intermediary.

In conclusion, Hogan's response to the MCI Petition for Rule-making is as follows:

(1) MCI's allegations that Hogan has violated AT&T Tariff 260's resale provisions are unfounded. Hogan's activities conform in all respects to requirements of the AT&T Tariff 260.

(2) In the long run the public's interest in more efficient, more flexible communications service -- and even MCI's objectives of emerging as a strong competitive carrier -- will be furthered by easing such restrictions. There are -- and should be - Hogan concludes,

no insurmountable legal or policy grounds barring more liberalized resale arrangements. The Commission should set as one of its important objectives the task of finding a responsible means of doing so.

October 19, 1972

MOTION TO CONSOLIDATE
OR, IN THE ALTERNATIVE
MOTION TO HOLD COMPLAINT IN ABEYANCE

Microwave Communications, Inc. (MCI), through its attorneys, hereby moves the Commission for entry of an order consolidating the above-captioned Amended Complaint of the American Trucking Associations, Inc. (ATA), filed under date of September 1, 1972, with the above-captioned Petition for Rule Making (Petition) filed by MCI on

June 13, 1972, or, in the alternative, directing that said Amended Complaint be held in abeyance pending disposition of MCI's Petition for Rule Making. In support whereof the following is shown.

I. MOTION TO CONSOLIDATE

1. In its Petition, MCI requested the Commission to initiate a broad inquiry into certain practices engaged in, or permitted by, the American Telephone and Telegraph Company (AT&T) involving alleged "sharing" of its facilities and other devices which we believe constitute anti-competitive and improper resale of AT&T's facilities. We also noted ATA's efforts to obtain single user treatment and outlined our objections to any extension of the "single customer" status now occupied by Aeronautical Radio, Inc. (Arinc). We asked, among other things, that the Commission reject any pending or future requests for extension of the single user concept to trade associations or other groupings of users of communications.

2. In its Amended Complaint, ATA has dropped its earlier request for damages on behalf of all motor carriers which had shared Telpak service prior to December 12, 1971, and lost their sharing rights after that date. It now asks only that the Commission direct AT&T to revise its tariff F.C.C. No. 260 to "accord the motor carrier industry the same single customer treatment as is now available to

the airline industry," plus the statutory forfeitures prescribed in Section 202 (c) of the Communications Act for every day following November 15, 1972, during which such benefits are not made available to the motor carrier industry. Thus it now seeks only a policy decision that it should be given the same advantageous rate treatment as Arinc. This matter can therefore be resolved in the inquiry and rule making proceeding we have asked the Commission to institute, without going through an evidentiary hearing. ATA has repeatedly undertaken to state the basis for its request for relief, and AT&T has not disputed any of its factual assertions. Indeed, it has argued that ATA's allegations do not justify the relief it seeks. There do not appear to be any issues of fact which cannot be resolved in a rulemaking proceeding looking toward the development of policy in this area. Cf. Specialized Common Carrier Services, First Report and Order, Docket No. 18920, 29 F.C.C. 2d 870 (1971).

3. There may be others who would seek "single customer" status if ATA is to be treated in that manner. The Commission should have all such requests before it at one time so that it can properly evaluate the impact of the ruling ATA has requested. As we have pointed out in our Petition (Pars. 34-35), extension of the "single customer" concept would effectively reverse the Commission's

action in eliminating the discriminatory Telpak sharing practice--which required some four years to accomplish. As things now stand, in the wake of that decision, each user of private line communications must pay rates in accordance with its own individual facilities requirements.

4. In the Telpak sharing case, the Commission found that AT&T was guilty of discriminatory practice in allowing some parties--including motor carriers, railroads, bus companies, etc.--to group their private line requirements in order to get the benefit of the low bulk rates in the Telpak tariff. It ordered the elimination of the discrimination--its original ruling that AT&T should allow universal sharing having been reversed by the court--and the carriers elected to eliminate sharing completely. While we can understand the concern of those who were thus deprived of favored treatment, it must be remembered that the advantage they enjoyed has been found to be unlawful. It would be inexcusable to allow AT&T now to reestablish such a preferential status for railroads and truck or bus companies simply by broadening another concept of dubious validity.

5. Indeed, we do not think that either the short range or long range interests of the trucking industry would be served if the Commission were now to yield to ATA's insistence that it be given single customer status--

and then, in the broad rule making proceeding we have sought, were later to decide, as we have contended, that there should be no extension of that concept. Short range, the motor carriers would again have to reconfigure their communications requirements to get the maximum benefits of single customer treatment, if it were to be authorized. The cost and inconvenience involved could easily outweigh the benefits of the grouping of their needs if this privilege were terminated as a result of the rule making we have requested. For the long run, the motor carriers cannot really benefit from unsettled communications rates. They have been forced to go from the Telpak rates to the rates for ordinary private line service. If they are now allowed to return to Telpak, only to lose it again in the near future, they would simply suffer a prolongation of uncertainty as to the communications costs on which they should be planning for the long run. Furthermore, the rule making approach might take less time than the hearing ATA may get on its complaint--and might be less expensive for all concerned and yield a better record upon which to base whatever action the Commission may decide to take. 1/

1/ If the Commission were to designate ATA's Amended Complaint for hearing, MCI would be forced to seek permission to intervene. Upon being authorized to participate as an intervenor, MCI would raise the same policy issues it seeks to explore in the rule making it has asked the Commission to institute. It seems probable that it would take longer to resolve matters in such a hearing than in a rule making procedure, where a record incorporating the information and opinions of all interested parties can be obtained much more expeditiously.

6. As a matter of fact, all users of business and data communications--including the motor carriers will get the maximum possible long run benefit from the entry and expansion of new communications entities. But the new specialized carriers who are trying to establish themselves in the business and data communications field can be discouraged from entry or crippled in their efforts to provide viable alternatives to communications users if AT&T is allowed to use devices which result in low rates for special categories of customers--whether they are called "single customers" or "joint users". As we have pointed out in our Petition for Rule Making, either course of action allows AT&T to pinpoint areas which the new competition might penetrate, and then try to forestall it by offering low rates for "shared" use of one kind or another. While this may yield short run savings for the parties given this preferred treatment, these benefits are likely to be short lived. They will probably be terminated either by Commission order, after a hearing in which their preferential and discriminatory character has been established, or by AT&T itself after its tactics have so weakened its competitors that it no longer needs to offer such low rates, or when expansion of the "sharing" rates begins to cut too deeply into its revenues. Such uncertainty and change is far less

desirable in the long run than stable rates in an environment of viable competition--which will lead to technical innovation, flexible service offerings, and rates somewhat lower than those the existing carriers now charge for the services in which the new carriers will compete with them. But these conditions will come about only if the Commission effectively bars unfair competitive practices on the part of the established carriers--including any broadening of "sharing" or "single customer" concepts.

7. These and other aspects of the policy issues posed by ATA's Amended Complaint can be disposed of more effectively and fairly in the broad rule making proceeding we have asked the Commission to initiate. This will allow all interested parties to participate in the resolution of the questions involved, while giving ATA a full opportunity to state its grounds for the relief it is seeking. A grant of our Motion for Consolidation will, therefore, lead to the more efficient disposition of the Commission's business.

II. MOTION TO HOLD COMPLAINT IN ABEYANCE

8. In the alternative, we move the Commission for entry of an order directing that ATA's Amended Complaint be held in abeyance pending the institution and conclusion of the rule making proceeding requested in our Petition

of June 13, 1972. For the reasons pointed out above, it would be undesirable to explore ATA's Amended Complaint in an evidentiary hearing at the same time the Commission--if it grants MCI's Petition--will be considering the issue posed by ATA, and a number of related questions, in a broad rule making proceeding. This would be wasteful and would involve unnecessary duplication of effort, and could conceivably take longer to resolve than the rule making alone. Furthermore, the Administrative Law Judge designated to hear the complaint, since he would be proceeding on a narrower record, might grant interim relief to the motor carrier industry, only to have the Commission reach a contrary result after full consideration of the whole range of "sharing" issues. Such frequent shifts are disruptive of the development of sound and efficient communications for the trucking industry, and would not serve its short term or long term best interests. Therefore, the Commission, if for any reason it does not wish to consolidate ATA's Amended Complaint into the rule making proceeding MCI has requested in its Petition, should at least direct that said Amended Complaint be held in abeyance while it institutes, conducts, and concludes such a rule making.

III. CONCLUSION

WHEREFORE, MCI respectfully requests the Commission to order the consolidation of ATA's Amended Complaint with

MCI's Petition for Rule Making, or, in the alternative, to direct that said Amended Complaint be held in abeyance pending the institution and conclusion of the rule making MCI has requested in its said Petition.

1730 M Street, N.W.
Washington, D.C. 20036

November 7, 1972

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F.C.C. 73-553

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TRUCKING ASSOCIATION, INC., WASHINGTON, D.C., COMPLAINANT *vs.* AMERICAN TELEPHONE & TELEGRAPH CO., NEW YORK, N.Y., DEFENDANT	Docket No. 19746

MEMORANDUM OPINION AND ORDER

(Adopted May 23, 1973; Released May 29, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND REID CONCURRING IN THE RESULT.

1. The Commission has before it an amended formal complaint filed by the American Trucking Association, Inc. (ATA) on September 1, 1972 questioning the lawfulness of provisions in American Telephone and Telegraph Company's (AT&T) Private Line Service Tariff (Tariff F.C.C. No. 260) which allows a particular customer—Aeronautical Radio, Inc. (ARINC)[1]—to order private line service on behalf of itself and air transport carriers. The National Association of Motor Bus Owners (NAMBO) filed a statement in support of ATA's complaint on September 16, 1972 and AT&T answered the amended complaint on October 16, 1972.

2. Section 2.2.1 of AT&T's 260 generally requires that the interstate private line services provided by the telephone companies to persons ordering such services shall be used "for the transmission of communications to or from the *customer* and relating directly to the *customer's business*" (our emphasis) and Section 2.2.3 of the same tariff prohibits the "re-sale" of such services or the use thereof to handle communications "for others." However, certain exceptions to these particular requirements are spelled out in the tariff. One of these exceptions is expressed in subsection (G) of Section 2.2.1 which specifically permits private line services to be used:

> "For the transmission of communications to, from, within and between air carriers, where the customer is an aeronautical communications company licensed under the Aviation Services rules of the Commission to operate stations in the aeronautical mobile and fixed services."

It is this particular subsection (and related tariff provisions) to which the complaint is addressed because ARINC is the only entity that fits this exemption and complainant contends that the results are that air carriers are given certain preferences and privileges that are denied to motor truck and other carriers of passengers and property (i.e. buses and railroads) that compete with the air carriers.

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[1] ARINC is a Delaware stock corporation operated to provide communications facilities for the conduct of air carrier and other aircraft operations under by-laws that provide for operation on a non-profit basis.

3. It is true that subsection (G) of Section 2.2.1 of AT&T's private line service tariffs has the effect of extending to ARINC and the airlines favorable treatment that is denied to other transportation carriers. There are at least six manifestations of such preferential treatment. First, subsection (G) permits ARINC to obtain private line services from the telephone companies for use by itself or by the individual airlines or groups of airlines without complying with the usual tariff requirement (2.2.1(A)) that all such services must be used to transmit communications *to or from ARINC itself*. (Our emphasis.) For example, ARINC, under this exemption, may order private line services between points on a single airline or between points on different airlines or between points on different airlines or between points on any airline and points off of any airline (e.g., government agencies, airframe manufacturers, etc.), without such private line facilities being used to handle communications *to or from ARINC*.

4. Second, subsection (G) permits ARINC to obtain private line services for itself or the airlines, without complying with the usual tariff requirement (See 2.2.1(A)) that all communications over such services must relate *directly to ARINC's* business. Thus, communications handled over any private line facilities that may be ordered by ARINC, no matter where such facilities may be located, may be used to handle communications that relate to any business, without any tariff limitation whatsoever on the nature of the business so handled over such facilities.

5. Third, subsection (G), in conjunction with language in Section 2.2.3 of the tariff, permits ARINC to obtain private line services for itself and the airlines without complying with a general prohibition in the tariff that such services *shall not be used for any purpose for which a payment or other compensation shall be received by either the customer or any authorized or joint user*. Thus, either ARINC or the airlines may, as far as AT&T's tariff is concerned, receive payment or other compensation in any amounts whatsoever from any entity with respect to any use of such private line facilities.

6. Fourth, subsection (G), in conjunction with language in Section 2.2.3, permits ARINC to avoid compliance with another usual tariff requirement that private line services may not be used *in the collection, transmission or delivery of any communications for others*. Thus, so far as the tariff is concerned, ARINC and the airlines are free to use these private line services to handle communications of any persons without limitation and, as heretofore indicated, to receive any compensation or payment therefor.

7. Fifth, subsection (G), in conjunction with a proviso in Section 2.5, permits ARINC to be a customer of the telephone company for private line facilities used by ARINC for itself or for the airlines without complying with another usual tariff requirement that *no one may be a customer for a private line service who does not have a communications requirement of his own for its use*. Under this exemption, ARINC may be a customer of AT&T to order any and all private line facilities for the airlines irrespective of whether ARINC itself has any need or use for such facilities.

8. Sixth, on the basis of the foregoing favorable tariff exemptions AT&T has followed the practice of permitting ARINC to order large volumes of private line service channels throughout the United States for itself and for the air carriers and thereby obtain the substantial *Telpak rate discount* on such services for the benefit of the air carriers.

9. As heretofore stated, complainant alleges, and AT&T concedes, that the motor truck carriers have been denied, in all respects, the same favorable treatment that has been extended by the telephone companies to the air transport industry. Moreover, it appears clear that all other surface transportation carriers, such as railroads and buses, have also been denied such treatment. ATA emphasizes that it does not question the validity of the exceptions extended to ARINC and the air lines and ATA alleges that it does not want to do anything to deprive the airline industry of this favorable pattern of treatment. However, ATA contends that it is a violation of Section 202(a) of the Act for AT&T to deny the same treatment to surface carriers that compete with the airlines and ATA requests that we direct AT&T to revise its tariffs to permit such treatment for all surface carriers and that AT&T be required to pay forfeitures provided for under Section 202(c) of the Act for violations of Section 202(a).

10. In its December, 1971, reply to ATA's earlier informal complaint,[2] AT&T explained its rationale for not extending to ATA and its members the same tariff and rate treatment accorded to ARINC and the airlines. AT&T stated that:

> "The reasonableness of the tariff provision in question rests upon a judgment that ARINC has unique operational characteristics and responsibilities which can be met most efficiently by permitting it, as a customer, to order and administer the communications requirements of the carriers which it serves."

AT&T added that these preferential tariff provisions were "not filed for the purpose of conferring any special rate advantage on the airline industry." In reaching its conclusion, AT&T placed substantial reliance on an early Commission decision which stated that:

> ". . . safety of life and property in the air is the principal purpose for which [ARINC] was organized and is operating under its existing declaration of policy. . . . Coordination [of radio and wire facilities] through a single agency will tend to promote the safety of life and property in the air."[3]

In its responsive pleadings to ATA's amended formal complaint, AT&T defends its tariff and rate treatment of ARINC and the airlines for the same reasons set forth above in responding to ATA's informal complaint.

11. We are of the opinion that the ATA complaint raises substantial questions as to whether there is adequate justification under the Communications Act for the aforementioned tariff regulations insofar as they permit AT&T to extend the aforementioned tariff and rate treatment to ARINC and the airlines and deny the same treatment (a) to ATA and motor truck carriers, (b) to other transportation carriers in competition with the airlines, and (c) to most other private line users (e.g. members of the National Retail Merchants Association) who might wish to group their service requirements to obtain the bene-

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[2] After ATA received no satisfaction on its informal complaint, it filed the instant formal complaint.

[3] *Aeronautical Radio, Inc.* v. *American Telephone and Telegraph Company*, 4 F.C.C. 155, 162-3 (1937).

fits accorded to the airline industry. In addition to these tariff provisions challenged by complainant, there are other provisions wherein the telephone company undertakes to provide all or some of the same privileges to other entities, such as corporate conglomerates (2.2.1(c)) stock exchanges and members (2.2.1(e)), electric power pools (2.2.1(f)) and state and local governments (2.2.1(g)). Since these privileges appear to be denied, in whole or in part, to other users generally, including complainant's members, we believe that the same questions of lawfulness are raised as to such provisions.

12. With respect to the airlines, a question is raised as to whether the different tariff treatment is warranted on the basis of AT&T's contention that we decided in 1937 that there were unique operational characteristics and responsibilities attributable to ARINC warranting such disparate treatment. 4 FCC 155 (1937) The issue before us in 1937 was whether ARINC was entitled to obtain private line teletypewriter service from AT&T as a customer of AT&T and to use such services *for ARINC's own use and benefit* and for the transmission of messages by ARINC in which ARINC *had a direct interest*. 4 FCC 155; 164–165 (1937) We expressly held that:

> "We desire to make it clear that, so far as this decision is concerned, we are merely passing upon complainant's right under defendants' existing tariff to a private line teletypewriter service *for its own use* in handling such communications as the record disclosed *it proposes to handle* and which relates to the safety of life and property in the air." (our emphasis) 4 FCC 155; 166 (1937)

Accordingly, our actual holding in 1937 was that ARINC could obtain private line services from AT&T for ARINC itself to transmit messages relating to safety of life and property in which ARINC had a direct interest even though such transmissions were to be for the benefit of the airlines. However, the issue raised by the ATA complaint is whether ARINC may obtain private line services not only for its own use but also for the use of the airlines themselves and obtain for itself and the airlines all of the privileges allowed by the tariff exceptions referred to above, which privileges are denied to the competitors of the airlines who claim that they also have a need to transmit communications which relate to safety of life and property. Furthermore, the changes that have occurred in ARINC's operations since 1937 raise questions as to whether and to what extent our decision in 1937 has applicability to pres[illegible] facts and circumstances.

13. In view of the foregoing, we conclude that the lawfulness issues presented by ATA's complaint should be resolved on the basis of an evidentiary hearing record. Moreover, since the same kind of tariff exemptions apply, in whole or in part, to corporate conglomerates, stock exchanges and members, electric power pools and state and local governments, we believe that the lawfulness of those provisions should also be investigated at the same time, on our own motion.

14. We should make clear that the scope of the issues to be investigated in this proceeding will be limited. We are concerned in this proceeding with resolving the basic question of whether or not the tariff provisions referred to above constitute unlawful discrimination or preferences within the meaning of Section 202(a) of the Act. Therefore, we are not concerned in this proceeding with questions as to the justness or reasonableness of Telpak rates or of any of the aforemen-

tioned general tariff provisions prohibiting "re-sale", third party traffic or receipt of compensation, except insofar as consideration of the justness and reasonableness of such general prohibitions may be relevant to a resolution of the foregoing basic issue. The lawfulness of these tariff restrictions, *per se*, is a matter that we are considering taking up in separate proceedings and the lawfulness of the Telpak rates is being considered in a separate docket (No. 18128). In summary, the hearing we are ordering herein is to determine whether the above-described differences in rate and tariff treatment that are extended to the airlines, corporate conglomerates, stock exchange members, and state and local governments, constitute unlawful discrimination or preferences within the meaning of Section 202(a) of the Act and, if so, what remedial action we should take to remove such unlawfulness, including among other possible actions, whether we should prescribe new or revised tariff provisions that would be just, fair and reasonable, as provided in Section 205 of the Act.

15. Accordingly, **IT IS ORDERED**, That, pursuant to Sections 4(i), 201, 202, 205, 208 and 403 of the Communications Act, an investigation is hereby instituted into the lawfulness of the aforementioned provisions of Sections 2.2.1, 2.2.3 and 2.5 of AT&T's Tariff F.C.C. No. 260 insofar as these provisions accord rate or tariff treatment to the airlines, corporate conglomerates, stock exchanges and their members, electric power pools, local and state governments, or others, that is denied in whole or in part to complainant or to any other person or persons;

16. **IT IS FURTHER ORDERED**, That the proceeding shall include inquiry into the following issues:

> (1) Whether such tariff provisions, insofar as they provide for the aforementioned different rate or tariff treatment, constitute, in whole or in part, unjust or unreasonable discrimination, or subject any person or class of persons to undue or unreasonable prejudice or disadvantage, or give any undue or unreasonable preference or advantage to any person or class of persons, within the meaning of Section 202(a) of the Communications Act; and
>
> (2) If the Commission should find that any of these provisions is in contravention of Section 202(a), what action the Commission should take to remove any such unlawfulness found to exist, including the question of whether the Commission, pursuant to Section 205 of the Act, should prescribe new or revised tariff changes that would be just, fair, and reasonable.

17. **IT IS FURTHER ORDERED**, That defendant's Motion to Dismiss **IS DENIED**.[4]

18. **IT IS FURTHER ORDERED**, That, the hearing in this proceeding shall commence at the Commission offices in Washington, D.C. at a time to be specified by the presiding Administrative Law Judge; and that such Administrative Law Judge shall, upon the closing of the record, prepare an initial decision which shall be subject to the submittal of exceptions and requests for oral argument as provided in 47 C.F.R. 1.276 and 1.277, after which the Commission shall issue its decision as provided in 47 C.F.R. 1.282 and that the trial staff of the Common Carrier Bureau shall be separated both from the Commission and from the Administrative Law Judge;

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[4] Further consideration is being given to the "Motion to Consolidate or, in the alternative, motion to hold complaint in abeyance" filed by Microwave Communications, Inc. (MCI) on November 7, 1972; however, we believe that our action herein is in accord with MCI's suggestion that there could be a "spin-off" of the single user issue for early resolution.

19. IT IS FURTHER ORDERED, That AT&T and the other Bell System operating companies and all other carriers listed as concurring carriers in AT&T's Tariff F.C.C. No. 260, are hereby named PARTIES RESPONDENTS herein, and complainant is permitted to intervene as a PARTY INTERVENOR upon written notice filed within 15 days after the release date of this Memorandum Opinion and Order.

Federal Communications Commission,
Ben F. Waple, *Secretary*.

PETITION FOR INQUIRY AND RULE MAKING

The Western Union Telegraph Company (Western Union) respectfully petitions the Commission to institute an Inquiry and Rule Making Proceeding to investigate the proliferating so-called "pseudo carriers" and the proposals of a number of entities seeking to provide "value-added" communications services, pursuant to 5 USC Section 553 and Section 1.401 of the Commission's Rules and Regulations.

At the outset, it is to be noted that certain communication services are presently being provided by non-certificated "pseudo carriers" which have neither applied for, nor obtained, FCC authority to provide such services.[1] Other proposed communications services are covered by applications either currently pending before the Commission[2] or expected to be filed shortly.[3]

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[1] See Appendix A hereto for summary descriptions of services provided by some of these entities.

The specific details of how each of these services will operate is not entirely clear,[4] but each appears to have two characteristics: (1) each proposes to serve a segment of the public message market presently served by established carriers; and (2) each such service involves the resale at a profit of transmission facilities obtained at tariffed rates from established common carriers.

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[2] Three applications have been filed and noticed:

- Packet Communications, Inc. (PCI) (File No. P-C-8533)
- Graphnet Systems, Inc. (Graphnet) (File No. P-C-8566)
- MCI Data Transfer Corp. (MDT) (File No. P-C-8589)

(Summary descriptions of the above applications are contained in Appendix B hereto.)

[3] Two other "value-added" proposed carriers, Telecommunications Network, Inc. (TNI) and Telenet Communications Corp. (Telenet) have indicated in pleadings that they will be filing applications. Other entities also of this nature have been mentioned in a recent edition of Telecommunications Reports.

[4] Deficiencies in certain of the "value-added" proposals were pointed out in Petitions to Deny filed May 16, 1973 by Western Union regarding the Graphnet and MDT applications. Western Union, although it knows of a large number of operating "pseudo carriers", believes a number are still not known. To this end Western Union believes the instant proposed Rule Making will result in identification of all such entities as well as providing details of each such carrier's operations.

Section 214(a) of the Act provides, inter alia, that:

> No carrier ... shall acquire or operate any line, ... or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the... operation of such additional or extended line.

Thus, Section 214 has been construed as requiring that any person desiring to furnish a common carrier communications service (i.e., operate a line or engage in transmission over a line) obtain a certificate from the Commission authorizing such service.[5] And, Section 214 contemplates that no authorization will be granted unless the Commission finds that "... the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional...line. (Emphasis added.)[6]

The Commission in accordance with Part 63 of the Rules has considered, inter alia, in ruling on a Section 214 application, the following issues:

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[5] MacKay Radio and Telegraph Co., 6 FCC 562 (1938)

[6] While Section 214 uses the term "line" rather than "service," MacKay, supra, 6 FCC at 571 makes it clear that these terms are interchangeable in the context where a line is for the first time being operated or transmission is first being engaged in to provide a new service.

a) factors showing a public need for the proposed service ;

b) competitive considerations when services of a similar character are being rendered by others, and why existing services are inadequate; and

c) the effect of "cream skimming".[7/]

Several of the carriers which are the subject of the instant Petition have denied, or at least questioned, whether the activity in which they propose to engage constitutes common carriage subject to regulation under the Act. This appears to be a frivolous argument. In the first place, the filing for Section 214 authority by some of the applicants indicates an awareness that their proposal falls within the ambit of Section 214. In the second place, examination of published descriptions of these proposals discloses that each such service involves primarily the provision by wire or radio of a communication service for hire.[8/]

[7/] See also, MacKay, supra, 6 FCC at 574-77; Specialized Common Carrier Services, 29 FCC 2d 870 (1971); cf., Federal Communication Commission v. RCA Communications, Inc., 346 U.S. 86, 73 S. Ct. 998 (1953).

[8/] See Section 3(h) of the Act, 47 USC Section 153(h). See also, State of Washington ex. rel. Stimson Lumber Co. v. KuyKendall, 275 U.S. 207, 48 S. Ct. 41 (1927); cf., Terminal Taxicab Co. v. Kutz, 241 U.S. 252, 36 S. Ct. 583 (1916). For a further discussion on this point see Western Union's Petition's to Deny the applications of Graphnetand MDT, filed May 16, 1973

Traditionally, Section 214 applications have been considered individually on their own merits by the Commission. In 1971, the Commission departed from this procedure in the case of the microwave specialized common carriers (29 FCC 2d 970) and there through the vehicle of a comprehensive Rule Making Proceeding established rules and procedures for dealing with applications for this category of service. This was done (a) because there was a large number of such applications in the same time frame proposing to serve the same market, and (b) the Commission felt there were policy issues applicable to each of such applications which could be dealt with expeditiously in a Rule Making Proceeding.

Recently, for the second time, MCI suggests utilization of a Rule Making Proceeding to deal with shared use services.[9] These include some of the same services with which our Petition is concerned. Western Union heretofore opposed a previous MCI Petition for Rule Making,[10] concerning "pseudo" common carriage, suggesting, instead strict enforcement of the Act by the Commission on a case-by-case basis. However, it has now become increasingly clear that the Commission could best deal with these proliferating services expeditiously in one rule making proceeding rather than on a case-by-case basis as previously suggested by us.

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[9] Comments of the MCI Carriers re Packet Communications, Inc. (P-C-8533) filed March 16, 1973.

[10] RM 1997, filed June 13, 1972.

A number of the proposed "value-added" entrants view the Commission's decision in Docket 18920, 29 FCC 2d 970 (1971), as the cornerstone to "open entry" which, as they would have it, virtually makes grant of their applications perfunctory and ministerial. We do not share this view.

Central to the Decision in Docket 18920 was the determination that specialized common carriers should be authorized because they would construct their own transmission facilities for private line purposes in competition with Western Union and AT&T (*e.g.*, 29 FCC 2d at 871) to serve a special market which the Commission found was not being adequately served by the existing carriers.[11] Nothing in that decision embraces proposals of the instant nature where various entities wish to compete with the existing carriers on a basis requiring little, if any, investment in facilities and resorting primarily to AT&T for transmission facilities.

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[11] A full discussion of this point is contained in Western Union's Reply to Response of Graphnet Systems, Inc., filed June 14, 1973. Therein, on pp. 5-6 we cited numerous examples of the limited scope of the Commission's *Specialized Common Carrier* decision, *e.g.*:

> The proposed services of the applicants are designed to meet needs not adequately met by the established carriers in the past. 29 FCC 2d at 913.

Indeed, such proposals could abrogate the benefits the Commission sought to obtain from Docket 18920, i.e., increased competition for AT&T in the transmission market. As brought out in the numerous pleadings filed by MDT and Datran, AT&T has already sought to take advantage of these new circumstances by filing an application[12/] to revise its sharing provisions with respect to hybrid services thereby permitting these services to become, in effect, agents of Bell in its competitive struggle against Western Union and the specialized common carriers.

In other words, it is implicit throughout the proceedings in Docket 18920 and the Commission's decision therein, that competition as a regulatory tool was to be utilized to spur innovation in the special data private line industry between the then existing common carriers (principally AT&T) and the then proposed specialized common carriers which would construct, own and be responsible for their own facilities. Nowhere did the Commission even remotely consider grants (or the policy considerations related thereto) to would-be carriers which would not have an investment in transmission facilities and would compete in selected markets with the essential services now being provided by Western Union's Public Message Ser-

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[12/] AT&T Application No. 931.

vice. Nowhere in that decision did the Commission consider the effects on other services being provided by Western Union, such as Mailgram, TWX and Telex. Patently, these new entities also seek to "cream skim" the most productive markets while leaving Western Union and others to serve the small, less economical markets.

Thus, Docket 18920 considered utilization of competition as a regulatory tool in a vital and growing industry in which one carrier's transmission capabilities literally dwarfed its competitors, as was evidenced by Western Union's reaction to the various Telpak offerings of AT&T, in the pre Docket 18920 era. In contrast, the domestic public message market has exhibited an historic decline which only presently appears to be leveling off, largely due to the benefits the public can now reap from Western Union's multi-million dollar modernization program. Western Union's other record and data services (Telex and TWX), while exhibiting growth still are in no way comparable to the transmission market considered in Docket 18920. Hence, whatever policy considerations were prevalent in Docket 18920 leading the Commission to utilize competition as a regulatory tool, may or may not pertain to the domestic record message and record exchange markets where competition stands only to "cream skim" the most lucrative markets to the detriment of the public.

If the instant "value-added" proposals are sanctioned, AT&T would enhance its present dominance over the transmission market by having "carriers" completely dependent upon it for their very survival. Instead of an innovative and responsive transmission industry, AT&T could hold the "value-added" and the "pseudo" carriers captive to the competitive detriment of Western Union and other carriers, particularly at a time when the effects of competition spawned in Docket 18920 are not yet known.

It is through the vehicle of the Inquiry and Rule Making proposed herein that the Commission should consider what public interest benefits, if any, would result from the competition which a grant of the instant "value-added" and "pseudo carrier" proposals would have.[13/] The Commission should ascertain, for example, the impact of such competition on Western Union's services, the ability of Western Union to fulfill its common carrier responsibilities under the Act if this type of competition is authorized, and what impact these proposals would have on the "new" transmission competition resulting from Docket 18920.

Accordingly, a new inquiry and Rule Making is required to look into the on-going operations of the "pseudo carriers" and to deal with the basic issues raised by the proposals of the "value-added" carriers.

[13/] This pre-supposes disposition of the fact that "pseudo carriers" have been operating without compliance with Section 214, *supra*.

Among the basic issues Western Union suggests be included in such a proceeding are:

1. Whether as a general policy the public interest would be served by permitting the entry of "value-added" or "pseudo carriers" to compete with the specialized and general purpose carriers.
2. Whether the further fragmentation of the industry which would result from establishment of resale-type services in competition with essential primary services now available from general purpose carriers is in the public interest.
3. Whether the proliferation of "value-added" carriers which will rely on facilities obtained primarily from Bell will promote or restrict competition.
4. What would the impact of competition of the nature provided by "value-added" and "pseudo carriers" be on Western Union's ability to perform its common carrier obligations under the Communications Act.
5. Whether competition of the nature provided by the "value-added" and "pseudo carriers" with

the prime services of Western Union is in the public interest.

In summary, Western Union urges the adoption of the rule making procedure to permit the Commission to carefully consider the impact of these"pseudo carriers"on the communications industry. Western Union's intention, in requesting this rule making, is not to inhibit competition; rather we seek to insure that those who enter the competitive marketplace can indeed spur the needed innovative services in a manner consistent with the public interest.[14] In the Specialized Common Carrier decision, the Commission carefully considered the impact of an open door policy in the specialized common carrier field. In the area of the"pseudo carriers," it has of yet had no opportunity to determine the public interest benefits, if any, to be derived from such services and therefore should, consistent with its Congressional mandate to promote the most efficient nationwide system of communications, fully investigate these proposed services.

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[14] As the Supreme Court has stated, "...the Commission must at least warrant...that competition would serve some beneficial purpose....[I]t is not too much to ask that there be ground for reasonable expectation that competition may have some beneficial effect. Merely to assume that competition is bound to be of advantage...is not enough." Federal Communications Commission v. RCA Communications, Inc., supra, 346 U.S. at 97, 73 S.Ct. at 1005.

WHEREFORE, Western Union respectfully prays that the Commission (1) institute the Inquiry and Rule Making requested herein and (2) invoke the statutory sanctions prescribed pursuant to Section 214(d) of the Act, 47 USC Sec. 214(d) and Part 63.01 of the Rules against "pseudo carriers" operating in violation of such Statute and Rule.

RM ____________
("value-added and
"pseudo carriers")

APPENDIX A

- Graphic Scanning Corp., 15 West 34th Street, New York, N. Y. Graphic Scanning maintains a network of equipment in 90 cities for the transmission of words, numbers and graphic data on an interstate and foreign basis by wire or radio.*/

- Graphic Sciences, Inc., Corporate Drive, Commerce Park, Danbury Conn. Through a small subsidiary (Hidoc New York International, Inc.) a facsimile transmission service is rendered. Graphic Sciences also offers a public message service termed "Vistagram" in 20 cities via facsimile.

- Titan Industries, 6290 Sunset Blvd., Los Angeles, Calif. Titan through its agent Hilton Hotels offers a public facsimile message communications network of a interstate and foreign nature. It also has a subscriber list and messages can be sent directly to such subscribers by either agents or other subscribers.

- NCS Computing Corp., 3960 N. Central Expressway, Dallas, Tex. NCS is believed to be offering a message telegraph system for hire.

- Comdata Network, 2209 Crestmoor Rd., Nashville, Tenn. Comdata offers the trucking industry a money transmission service via facsimile. The service utilizing equipment of Graphic Sciences manufacture is available at some 300 outlets.

- Instacom, Inc., 7055 Carpenter Freeway, Dallas, Texas Instacom offers a money and message service through a large number of public outlets via facsimile.

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*/ Western Union has instituted injunctive and declaratory proceedings in the U.S. District Court for the Southern District of New York against Graphic Scanning (72 Cir. 3952). The instant proceeding dealing with the substantive question of whether certification pursuant to Section 214 of the Act should be granted for services such as provided by Graphic Scanning, would not affect such pending suit.

- Transceiver Corp., Lennox Hill, P. O. Box 424, New York, N. Y. Transceiver offers an interstate message, permit and money transmission service through approximately 300 outlets. It utilizes facsimile equipment for transmission.

- Transport Data Communications, Inc. 122 Edinburgh Court, Greenville, S. C. This company offers a message switching service to subscribers which appears to be similar to Western Union's Info Com service. Most subscribers are motor carriers. Messages can be exchanged either within a subscribers network or with other subscribers.

- Xerofax, Inc., P. O. Box 188, Valley Falls, N. Y. Xerofax offers a public interstate message, permit and money transmission service utilizing facsimile equipment.*/

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*/ Information concerning all of the foregoing is based on information, knowledge and belief.

515 RM_______________
("value-added"and
"pseudo carriers")

APPENDIX B

The following will briefly describe the proposals of MDT, Graphnet, and PCI.

Description of MDT's Proposal

MDT's message system will operate in a manner similar to that of Packet Communications, Inc. Consisting of computers, terminal equipment and leased transmission facilities, the service is intended to provide an end-to-end data and message switching transmission network. MDT asserts it will be able to interface with various types of terminal equipment and will use common carrier transmission facilities for intra and intercity transmission. The applicant intends to establish "MDT city collection centers" where various types of messages will be collected and forwarded to other MDT collection centers which will then transmit the message to its ultimate destination. At the collection centers the computer will perform switching, formatting, priority checking and speed conversion.

Three types of service are proposed by MDT. The first, throughput maximizer, is a customized service which MDT expects to develop for individual users who have specific communications requirements. Priority concentration service-fixed destination, the second type of service, is designed by MDT for shared operation of carrier facilities by a number of users. A special feature offered as part of this service will be priority of transmission whereby the user will be able to select his desired speed of transmission. Charges are to be established according to connect time, message length and priority of transmission. Finally, priority concentration-addressable destination is proposed by MDT and differs from the fixed destination service in that subscribers will be able to send messages to more than one destination.

In providing this service, MDT expects to appeal to data communications users, administrative intra-company message switching systems, digital facsimile users and switched message services. In describing the market for its proposed service, MDT cites various statistics indicating the growing need for data processing and transmission systems, the increased use of computers in communications, and the growth in data communications transmission. MDT proposes initially to serve 30 cities throughout the country.

With respect to costs, MDT describes the capital equipment sufficient to serve the first 15 cities. In each city there will be two minicomputers costing $50,000 apiece and in one city there will be two maxicomputers to monitor the entire system, costing $750,000 apiece. Test equipment in the 15 cities will cost $10,000 and various other equipment, such as modems, multiplexers, concentrators and customer interface equipment will cost $3 million. Miscellaneous costs are estimated at $350,000 and administrative costs at $612,000. Thus, for a total cost of $7,112,000, MDT asserts it will be able to commence operation.

Description of Graphnet's Proposal

Graphnet intends to establish an exchange type network of facsimile terminals utilizing transmission facilities leased from established common carriers. This computer switched network system will operate on a store and forward basis and purportedly will accommodate input from various subscriber terminals, including Telex and TWX. Access from various different types of subscriber terminals will be made to a local concentrator which reduces the message to its transmission size and forwards it to a regional computer processing center. The message is then sent on to the remote terminal.*/

Graphnet claims that access to its concentrators will not allow for more than one busy signal in 100 transmissions and that messages improperly formatted or destined to unverifiable subscriber terminals will be rejected. Transmission speeds will be 9600 bits per second between a concentrator and its serving computer, and 230,000 bits per second between the computers themselves. Essentially, Graphnet will employ the Packet Switching concept which breaks down a message into smaller parts and transmits each part separately over the same or different routes. Messages once accepted by this system and in queue for delivery can be alternately routed.

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*/ There will be a $6.00 subscription charge and usage charges based upon total connect time.

Installation of this facsimile system will take place in two phases; the first phase will result in the location of concentrators in 27 major cities. Claiming the cost to finance the system will be $1,325,000, Graphnet asserts it will be able to raise $30 million from public sale of securities.

Description of PCI's Proposal

Packet Communications, Inc. (PCI) has applied for authority to institute and operate a communications network providing terminal-to-computer and computer-to-computer services. The packet switching system consists of packet switching processors or interface message processors which are connected to a customer or host computer terminals such as teleprinters are connected to the packet switching processors by terminal access processors. The packet switching processors or minicomputers effect speed and code conversion, subdivide and reformat the message into packets and transmit the packets to the receiving packet switching processor. Once received, the

the packets are reformed into the original message. Adaptive routing is one of the essential features of packet switching and involves the transmission of a message over various routes.

PCI insists this service will be attractive to various data transmission markets such as manufacturing, banking, insurance, brokerage and real estate industries, credit check systems, airline reservation systems, universities, and the commercial remote access computer industry. Initially, PCI proposes to institute packet switching in approximately 20 cities.

PCI expects to raise necessary funding through private and public sale of its securities and commercial bank borrowing. In 1973, PCI will require a total of $1,906,000 working capital and in 1974, the first projected year of operation, PCI will require $12,264,300. It will not be until 1976 that PCI will show a profit for its services; that year it estimates it will have approximately $2,087,000 of operating income. While not designating a specific amount as the cost of each packet switching processor or terminal access processor, at the end of 1974 PCI estimates that it will have expended $2,307,000 on such equipment. The yearly expense through 1977 for the packet switching processors and terminal access processors amount to approximately $4,000,000 a year and the total capital expenditure will total slightly more.

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OPPOSITION TO PETITION FOR ENLARGEMENT OF ISSUES

(To Be Acted Upon by the Commission)

American Telephone and Telegraph Company (AT&T), pursuant to Sections 1.45(a) and 1.229(c) of the Commission's Rules, respectfully opposes the "Petition for Enlargement of Issues" (Petition) of MCI Telecommunications Corporation, MCI-New York West, Inc., Interdata Communications, Inc. and Microwave Communications, Inc. (MCI), dated July 25, 1974. In support of its Opposition herein, AT&T respectfully states as follows:

1. MCI's Petition requests the Commission to enlarge the issues in this proceeding to include a new issue concerning the adequacy of the Commission's Uniform System of Accounts and a determination of the basic principles to be applied in the development of a new system of accounts.*

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* MCI's Petition is procedurally defective for its failure to comply with Section 1.229(c) of the Rules, requiring motions to enlarge issues to contain specific allegations of fact and be supported by affidavits.

Such an issue roams far beyond the scope of this proceeding, and is wholly inappropriate for consideration herein.

2. MCI cannot seriously contend that the development of a new Uniform System of Accounts is required for the resolution of the issues in this proceeding. The Commission in its Notice of Inquiry and Proposed Rule Making herein, released July 5, 1974 (FCC 74-689), has stated that the basic question to be resolved in this proceeding is:

> ". . . whether, and under what conditions, subscribers of various service offerings of communications common carriers should be allowed to resell such services to others or to participate with others in the sharing or joint use of such services, and, if so, whether and to what extent the Commission should regulate any such resale or shared use." (para. 1)

Consideration in this proceeding of a revision of the Uniform System of Accounts is not necessary to resolve this basic question. Indeed, injection into this proceeding of the complex and far-reaching implications of a revision of the Uniform System of Accounts would unnecessarily burden what already promises to be a voluminous record.

3. MCI's Petition urges "a complete restructuring of the uniform system of accounts which the Commission has prescribed for use by common carriers." (Petition, p. 3.) Changes of the nature contemplated by MCI should be considered, if at all, with due regard for the full implications thereof.

Such changes would sweep well beyond the results of this proceeding and touch every aspect of common carrier operations. Thus, any such proposal, if deemed appropriate for consideration at this time, should be weighed in a broader context where those implications can be addressed. MCI asserts no reason why a petition for rulemaking pursuant to Section 1.401 of the Rules is inadequate or inappropriate for the changes in the Uniform System of Accounts which it seeks herein.

WHEREFORE, AT&T respectfully requests that MCI's Petition be dismissed.

August 7, 1974

[There are no pages 523,
524,
[illegible] and
[illegible].]

FCC 74-1030

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REGULATORY POLICIES CONCERNING RESALE AND SHARED USE OF COMMON SERVICES AND FACILITIES
Docket 20097
RM-1997
RM-2218

MEMORANDUM OPINION AND ORDER

(Adopted September 25, 1974; Released October 3, 1974)

BY THE COMMISSION: COMMISSIONERS WILEY, CHAIRMAN; AND REID CONCURRING IN THE RESULT.

1. We have before us a "Petition for Enlargement of Issues" filed on July 25, 1974, by MCI Telecommunications Corporation, MCI-New York West, Inc., Interdata Communications, Inc. and Microwave Communications, Inc. (hereinafter referred to collectively as MCI) requesting that the following issue be added for consideration in this proceeding[1]:

> Would the Commission's ability to deal with the resale of the facilities and services of the established carriers, to regulate the activities of those proposing sharing or resale, and to discharge its general responsibilities with respect to the regulation of common carriers be enhanced by the development of a completely revised uniform system of accounts? If so, what basic principles should be applied in developing a new system of accounts? How can the system of accounts be changed in order to permit the development of costs on a per service, per route, per customer, or other appropriate basis with greater speed and accuracy and at lower costs? Suggestions for specific breakdowns of costs (including carrying charges for plant used in providing different services) to be kept by common carriers will be welcomed.

Oppositions to this petition were filed by the American Telephone and Telegraph Company (AT&T) and Telenet Communications Corporation (Telenet), both on August 7, 1974. On August 19, 1974 MCI replied to these oppositions.

2. In support of its request to include an issue relating to the carrier's uniform system of accounts, MCI argues that answers to Issue 2(b)[2] will depend in large measure upon the validity and fairness of

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[1] Notice of Inquiry and Proposed Rulemaking, 47 F.C.C. 2d 644 (1974).

[2] Issue 2(b) calls for comments as follows:

2. Would the public interest be served by a removal of all restrictions on resale of private line services? What would the effect thereof be on:

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b. The Communications Industry apart from AT&T and Western Union: How would removal of resale restrictions affect the viability of other carriers with their own lines of communications, the stimulation of research and development, the market for new equipment, the development of new carriers, the stimulation of the market for wire and radio communications?

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the rates the telephone companies charge the entities who may be authorized to resell facilities leased from the telephone carriers and who may thereupon be offering services in competition with those offered by the specialized carriers. In order to determine the validity of such rates, MCI claims, the Commission must develop new tools for analyzing and evaluating Bell's rates and the underlying cost of providing various classes of service. MCI argues that experience over the last twelve years demonstrates that the uniform system of accounts does not permit the Commission to derive data it needs in order to deal with new regulatory problems arising as a result of the introduction of competition. MCI specifically asserts that unless a new system of accounts is developed, the Commission cannot determine whether AT&T's Telpak service charges are fair, reasonable and non-discriminatory.

3. Both AT&T and Telenet point out procedural defects in MCI's petition and, in addition, raise substantive objections. Procedurally, AT&T notes that Section 1.229(e) of our rules had not been complied with as the petition does not contain specific allegations of fact. Telenet on the other hand argues that Section 1.229 does not apply since this proceeding is neither an adjudication nor a rulemaking required by law to be made on the record after opportunity for a Commission hearing (see Section 1.201 of our Rules). Telenet further notes that under the procedure contemplated in this proceeding a specific request to enlarge issues is not necessary since the public is invited to submit information relevant to the subject matter before us even if it is not specifically called for in the stated items of inquiry.[3]

4. Substantively, AT&T and Telenet argue that revisions of the uniform systems of accounts should neither be considered nor undertaken in this proceeding since the subject matter bears only a tenuous relationship to this proceeding and the task of revision is one which would surely involve a considerate amount of time and effort. Inclusion of such a task would unnecessarily burden what should prove to be a massive and complex proceeding. AT&T suggests that MCI's request should be made in a separate petition for rulemaking.

5. MCI, in reply, does not address any of the procedural points raised by AT&T and Telenet. MCI repeats its concern over the availability to resale entities of Telpak volume discounts. Finally, MCI argues, if the Commission feels the obstacles to revisions in the uniform system of accounts are insurmountable then it would be inadvisable to allow resale entities to offer service to the public.

6. We do not agree with AT&T and Telenet that there are procedural barriers in our rules to consideration of a petition of this nature but we do not believe this proceeding to be an appropriate vehicle for consideration or resolution of the issue suggested by MCI. It is implicitly recognized in MCI's petition that proper regulation of AT&T rates for services is necessary to assure a healthy competitive environment whether or not such services are being offered to the public directly by AT&T or are integral to a service offered by a third party. It cannot be said that this issue is unique to resale and shared

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[3] *See* Notice of Inquiry and Proposed Rulemaking 47 FCC 2d 644 (1974), paragraph 35.

use of carrier services. And, as AT&T and Telenet have pointed out, the revision of the uniform system of accounts is a matter touching all aspects of common carrier operation, should prove to be a task of great magnitude and a matter of concern to a far broader spectrum of the public than resale and shared use. Inclusion of this issue would only detract from the principal area of concern in this proceeding which does not involve, at least directly, charges for service.

7. It has not been suggested that special rates for AT&T services should or may be appropriate when a resale is involved. As such the most appropriate forum for consideration of rates is in a traditional rate investigation, many of which are currently ongoing concerning rates for services which may be subject to resale: e.g. Docket 19919 (Bell's Hi Lo rate structure for voice grade private line service) Docket 19989 (WATS tariff revisions), Docket 18128 (private line rate relationships and Telpak rates) and Docket 20099 (Facilities to other carriers). To our knowledge MCI, which has participated in each of these investigations, has not even seriously suggested in such proceedings that the rates under investigation cannot be properly reviewed until revisions are made in the uniform system of accounts.

8. In summary, then, we find no procedural defects in MCI's request but do not feel this proceeding to be the appropriate vehicle for considering revisions in the uniform system of accounts. The reasonableness of AT&T's rates is of concern to us whether services may be offered directly to the public or via a resale entity. We fail to see how the development of better tools for rate investigation should be of greater concern to competitors when we are considering resale policies than it is when we are examining AT&T's rates directly. We will, therefore, deny MCI petition.[3]

9. A separate matter has arisen in this docket which requires comment and action. We have also received petitions for leave to intervene from various members of the public. Leave to intervene is not a necessary prerequisite for participation in this inquiry. Many persons intending to participate in this proceeding have, however, requested that we establish a procedure to facilitate prompt exchange of comments and reply comments. We note that our rules do not provide for service of comments in rulemaking proceedings (see Section 1.401 *et seq.* of our Rules). However due to the nature of the issues, the volume and complexity of comments expected and the need for careful analysis thereof by those preparing replies and responses, we believe that better replies and responses can be received in the time periods allowed if comments and reply comments are served on all active participants. We do not want to burden participants with a requirement that any member of the public be served, but only those whose interest is such that they definitely will be filing comments and reply comments. We are therefore providing that persons with a definite intention to file comments and reply comments in this proceeding so inform us two weeks prior to the last date to so file and we will promulgate,

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[3] In so acting, we do not reach the question of whether review of the uniform system of accounts is necessary or desirable at this time.

by Public Notice, a list of such persons.[5] All comments and reply comments should be served on the persons appearing on such list.[6]

10. Accordingly, IT IS ORDERED, That MCI's Petition for Enlargement of Issues is hereby DENIED.

11. IT IS FURTHER ORDERED, That all interested persons who will be filing comments and reply comments in this proceeding should so inform the Commission two weeks prior to the last date for filing comments. The Commission will prepare and promulgate, by Public Notice, a list of such persons. This list will be the service list in this Docket and all comments and reply comments are to be served on the persons appearing on such list.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[5] By Order of August 2, 1974, the Chief, Common Carrier Bureau extended the time to file comments in this proceeding until November 11, 1974; therefore notices of intention to file comments should be received by October 28, 1974.

[6] This procedure is established on a trial basis. It will not be applied to other, similar proceedings unless it proves to be of benefit without imposing an unreasonable burden on any participant.

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COMMENTS OF SOUTHERN PACIFIC COMMUNICATIONS COMPANY

Comes now Southern Pacific Communications Company (Southern Pacific), a specialized communications common carrier, by its attorneys, and in response to the Commission's Notice of Inquiry and Proposed Rule Making, 47 F.C.C.2d 644, released July 5, 1974, as modified, FCC 74-1030, October 3, 1974, in the above referenced proceeding, respectfully submits its comments on the issues designated for inquiry and rule making.

I. Interest of Southern Pacific Communications Company

1. Southern Pacific is the licensee and permittee of more than 150 new fixed point-to-point microwave radio stations in the domestic public radio service which provide the only coast-to-coast system of specialized communications in the nation. Service is being furnished to an increasing number of cities and states as the system expands through additional construction, acquisition, leasing, and interconnection. Southern Pacific furnishes specialized communications common

carrier services oriented to meet the particular needs of business, industry, government, and educational entities, with individualized facilities tailored to the requirements of subscribers to insure flexibility and economy. Communications channels are designed to provide for the transmission of data, facsimile, telemetering control, and voice, and, in addition, wideband facilities can be provided to handle extremely high speed data transmission or video, as required. Service is provided by a sophisticated microwave system, employing the most recent solid state technology in order to maximize performance and reliability and to minimize downtime. Recent innovations in the specialized services provided by Southern Pacific include Digital Data Service, a nationwide Scheduled Metered Time Service, and a complete high resolution, high speed Facsimile Service to speed document transmission and publication.

2. Southern Pacific has a direct and substantial interest in this proceeding, which is designed to determine the terms and conditions of resale and shared use in the regulations, practices, and tariff provisions of Southern Pacific as well as other carriers. It is anticipated that the determination made in this proceeding will substantially affect the competitive relationships of Southern Pacific with other carriers, subscribers, and other users.

II. Issues 1-4 -- Restrictions on Resale of Private Line Services

3. Resolution of the issues relating to the justification and proper scope of restrictions on resale and third party traffic in

communications private line services must necessarily begin with first principles. Under Section 3(h) of the Communications Act of 1934, as amended, a common carrier is defined as any person engaged as a common carrier for hire in interstate or foreign communications by wire or radio, or in interstate or foreign radio transmission of energy, except as otherwise provided. 47 U.S.C. §152(h). When a party engages in the resale of common carrier services and facilities leased from a regulated carrier, the resale is subject to the supervisory authority of this Commission, Ambassador, Inc. v. United States, 325 U.S. 317, 323 (1945). In making a public offering of the communications service for hire, he cannot escape the regulatory power of the Commission under the statutory scheme of the Communications Act merely because he leases the existing physical facilities of another carrier and engages in no new construction of his own under Section 214 of the Act. Mackay Radio and Telegraph Company, 6 F.C.C. 562 (1938). If this were otherwise, as the Commission recognized in this early seminal definition of its jurisdiction, 6 F.C.C. at 573-574:

> It would open the door for nation-wide expansion by a * * * carrier having little or no physical facilities of its own, without any possible supervision by this Commission and though disastrous competition might result. It is conceivable that a newcomer into the public * * * field might lease idle circuits on every line of the Bell System and thereby without the necessity of any capital expenditure whatever extend its public * * * system into every area in the United States by the simple device of superimposing such public * * * system upon the existing telephone plant. This might or might not mean ruin for [competing carriers]. It might or might not be in the public interest, but it is hardly conceivable that Congress intended to permit it unless that Commission should first find that it would be in the public interest. [Emphasis added]

4. To obtain certification, a carrier must make an affirmative showing that he will serve the public convenience and necessity, and that he is legally, financially, technically, and otherwise qualified to receive a certificate from the Commission. If the effect of the certification is to create or increase competition in the provision of common carrier services, there must be ground for reasonable expectation that competition may have some beneficial effect, and the Commission must at least warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it. The Three Circuits Case, FCC v. RCA Communications, Inc., 346 U.S. 86, 97 (1953). The Commission's First Report and Order in the Specialized Common Carrier Inquiry, Docket No. 18920, 29 F.C.C.2d 670 (1971), is a classic example of an instance in which the public interest and public need considerations were demonstrated before entry was permitted and common carrier regulation was applied.

5. Once certificated, a carrier is further regulated to assure protection to the public interest, not only in the filing of reports to enable the Commission to review its operations, but also in such restraints as the prohibitions against unjust or unreasonable charges, practices, classifications, or regulations under Section 201(b) of the Act, against undue discrimination and unlawful preferences in Section 202(a), and against the construction, extension, or discontinuance of lines without prior approval of the Commission under Section 214.

6. This threshold requirement--that the party seeking to resell must meet the rigorous requirements of certification by the Commission and be subject to regulation in its operation as a common carrier by the Commission under the Act-- defines the appropriate parameters in ascertaining whether there is adequate justification for restrictions on resale in the tariffs of regulated carriers. Resale restrictions upon entities which are not certificated as communications common carriers for hire are appropriate and necessary to protect the public interest. Unregulated entrepreneurs, arbitrageurs, and psuedo-carriers can make no substantial contribution to the goal of the Communications Act "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges", 47 U.S.C. §151. Without regulation, there is no assurance that they possess adequate financial resources, plant and equipment, and the operational competence necessary to provide an efficient service to the public. Entities entering the "communications resale business" without having to establish their qualifications may well find that they are unable to survive, and go out of business, causing an abrupt discontinuance of service, without any protection to the members of the public depending upon their services to meet their communications needs. Without regulation, there would be no requirement imposed upon the

entities to provide communications service upon reasonable request, to discontinue service only upon a public interest showing, and to provide service without preference or discrimination favoring some users to the detriment of others.

7. Indiscriminate entry by entities not required to demonstrate that they will provide new or distinctive services or meet a public need served by their entry would also have a disruptive effect upon the rate levels, rate structures, and revenue requirements of the certificated common carriers. The Supreme Court observed in the Ambassador case that "[i]t has long been recognized that if communications charges are to correspond even roughly to the cost of rendering the service, the use to which telephone installations may be put by subscribers must be subject to some kind of classification and regulation which will conform the actual service to that contracted for." 325 U.S. at 322. Reasonable classifications by carriers in providing communications services would be seriously endangered if entities through resale are permitted to avoid the purposes and cost bases of these classifications.

8. On the other hand, where a carrier has been certificated by the Commission, a regulatory determination has been made that the carrier is qualified to provide the services, regulatory responsibilities have been imposed upon the carrier defining the terms and conditions under which those services are to be offered, extended, or discontinued,

and, most importantly, the carrier has demonstrated that the communications services it will offer meets a public need. In the case of the "value added carriers", for example, a condition precedent to grant was a finding by the Commission that the carriers would introduce new improved means of communications not available from existing carriers for users having data transmission requirements. See, e.g., Packet Communications, Inc., 43 F.C.C.2d 922, 925 (1973); Graphnet Systems, Inc., 44 F.C.C.2d 800, 801-802 (1974).

9. Similarly, in the Specialized Common Carrier Inquiry, Docket No. 18920, 29 F.C.C.2d 870, 913, 917, 920 (1971), the Commission was "concerned with the sharing of a new, relatively untouched market in a field where even present demand is growing at a very rapid rate", and found "ample basis in the record and other material officially before us for the staff's conclusions as to the nature of the potential market, the public need and demand for the proposed services, the public benefits that may reasonably be anticipated from new entry and the effect on existing carrier service to the public". The Commission found on the record that

> there is a public need and demand for the proposed facilities and services and for new and diverse sources of supply, competition in the specialized communications field is reasonably feasible, there are grounds for a reasonable expectation that new entry will have some beneficial effects, and there is no reason to anticipate that new entry would have any adverse impact on service to the public by existing carriers such as to outweigh the considerations supporting new entry. We further find and conclude that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.

10. In those cases where the Commission has granted a certificate of convenience and necessity to a carrier, and thereby certified that the carrier is qualified to operate under public interest responsibilities, and that there is a public need for the services authorized, it would be against the public interest to permit restrictions to be placed upon the resale by that carrier of facilities which it seeks from another carrier in order to provide its authorized services. To deny the regulated carrier the opportunity to resell improperly restricts the carrier from providing the services which the Commission has already determined would be in the public interest. Accordingly, certificated carriers should be permitted without restriction to lease and resell all types of facilities provided by the other regulated carriers to their own customers in order to permit the carriers to provide all the services authorized by the Commission.

11. Similar considerations impelled the Commission to require the Bell System to provide interconnection facilities to specialized carriers in Bell System Tariff Offerings, 46 F.C.C.2d 413 (1974), affirmed Bell Tel. Co. of Pennsylvania v. FCC, No. 74-1386 (3d Cir. Sept. 11, 1974). The Commission found that its prior orders had been broad enough to require the telephone companies to provide interconnection facilities for the specialized carriers on a non-discriminatory basis for all services provided to an affiliated or other carrier in competition with the authorized services of the new specialized carriers, absent a significant showing

that such interconnection is not technically feasible, and that they covered interconnection for the broad range of services which the specialized carriers are authorized to provide. The Commission issued its interconnection orders to make clear that achievement of its objective that competition in the provision of interstate private line communications be on a full, fair, and non-discriminatory basis requires the issuance of broad interconnection orders to provide such facilities for all the authorized services of the specialized carriers. 46 F.C.C.at 423, 426-427. As the Third Circuit observed in affirming, "the Commission focused upon a *full field* of private line services theretofore provided by the established carriers" (slip opinion, p. 38; emphasis in original). It is, therefore, completely impermissible to impose restrictions upon resale by specialized carriers seeking to supplement its facilities in order to provide the full range of its authorized services.

12. In current negotiations to resolve the issues in *AT&T Offer of Facilities for Use by Other Common Carriers*, Docket No. 20099, 417 F.C.C.2d 660 (1974), the Bell System has taken a position diametercally in opposition to the Commission's rulings in Docket No. 19896, that is, that in the absence of an express Commission order, it will not furnish any facilities other than voice grade facilities to specialized carriers between two exchanges whose rate centers are more than forty miles apart, although it will furnish voice grade facilities

without geographical limitation. This artificial and arbitrary distinction between voice grade and group, supergroup, video, and other bandwidth facilities has absolutely no foundation in the Commission's authorizations of specialized carriers. At no time did the Commission contemplate that a specialized carrier's authorized services in any area would be limited to voice grade. Indeed, to the contrary, the Commission's emphasis in the Specialized Carrier Inquiry upon data communications necessarily contemplated that the new carriers would provide wideband facilities as an integral part of its array of services.

13. The authorized services of the specialized carriers thus include, but are not limited to, the voice grade facilities which are provided by the telephone companies, and the new carriers must be able to provide the entire spectrum of bandwidths necessary to meet the full range of their customer's requirements. See 29 F.C.C.2d at 906-912. As specialized carriers are freed of the difficulties involved in startup operations and as they expand their operations, as appropriate terminal equipment becomes available, and as they establish their credentials with prospective users and gain in operating experience, it may be expected that more and more they will provide users with the "flexibility and a wider range of choices as to how they may best satisfy their expanding and changing requirements for specialized communications

services," Commission Policies Governing the Licensing and Regulation of Specialized Common Carriers, 44 F.C.C.2d 467, 473-474 (1973), reconsideration denied, FCC 74-1247 (Nov. 18, 1974).

14. Southern Pacific's recently introduced nationwide data service provides a faster and more efficient service than any now offered by Bell, and its Scheduled Metered Time Service provides a service ideal for small businesses on a cost effective basis for several hours per day when they are unable to afford full time private line service. Looking to the future, Southern Pacific projects that a full 60% of its services are of a type not now available from traditional communications common carrier service. If Southern Pacific is fully to realize its capacity and mission to foster innovation and to offer new and diverse services, manifestly it cannot be restricted to only being able to obtain voice grade facilities from AT&T in extending its services to the public.

15. AT&T's restrictions in refusing to provide interconnection to Southern Pacific of other than voice grade facilities beyond the local distribution area not only inhibits and stultifies its ability to provide the full range of authorized service, but it is also clearly discriminatory vis-a-vis the services provided by the Bell System to its own customers. Thus if a user wishes to obtain wide-band facilities between Houston and Denver, and if (as is presently the case) Southern Pacific's facilities only extend between Houston and St. Louis but not

to Denver, the customer must necessarily use the Bell System for the entire route, even though Southern Pacific's services between Houston and St. Louis may be superior to those of Bell, and even though the customer prefers to use Southern Pacific's system for that segment. The Bell System's restrictive conditions, therefore, have the unlawful effect of creating an artificial preference and perpetuating a monopoly over the entire route.

16. In addition, it may be noted that the Bell System's limitation under which it will provide only voice grade facilities beyond local distribution areas appears to create a distinction in favor of domestic satellite against terrestrial carriers, since the Commission has made it plain its objective of "assuring that all carriers providing retail interstate satellite services (whether or not affiliated with Bell System companies) have access at non-discriminatory terms and conditions to local loops and interexchange facilities as necessary for the purpose of originating and terminating such interstate services to their customers." Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities, 35 F.C.C.2d 844, 856 (1972), 38 F.C.C.2d 665 (1972) (emphasis added).

17. The refusal of the Bell System to provide wider than voice grade facilities on an interexchange basis beyond the local distribution area is particularly unjustified because the specialized carriers do not seek some sort of subsidy from Bell, but are willing to pay

Bell to equip any unused capacity on its own facilities to provide group, supergroup, and video bandwidth facilities. Accordingly, in order to foreclose competition, Bell is foregoing revenues and contribution by not providing such facilities to the specialized carriers.

18. Moreover, the Bell System not only restricts specialized carriers from providing their full complement of services to the public, but Bell also severely restricts its own private line customers under its state tariffs and AT&T Interstate Tariff F.C.C. No. 260 from interconnecting with specialized carriers in an efficient manner. For example, Bell customers must have a communications requirement at the point of termination of a Bell line, and the termination must be provided at the customer's premises, so that the customers may not order a private line circuit directly to the technical operating center of a specialized carrier. As a result, in many instances this restriction either entirely precludes the customer from obtaining a portion of his network from a specialized carrier, or requires the customer to incur substantial additional expense in interconnecting a private line circuit from Bell to the customer's premises before it may be connected to the specialized carrier's technical operating center.

19. In summary, it is submitted that resale restrictions are validly applied against an entity which is unregulated by the Commission, and thus has not established its qualifications to serve a public need, and does not bear the public service responsibilities of a common carrier for

hire, but they are unjust, unreasonable, and contrary to law when they bar resale by a specialized carrier whose provision of services has been certificated by the Commission to be in the public interest. The bar against resale by certificated common carriers is unlawful, and Bell's attempt to create an artificial distinction between voice grade and other than voice grade facilities is completely without support in law, reason, or the Commission's decisions.

III. Items 5-8 -- Sharing (Joint Use) Arrangements

20. As described by the Commission in its Notice of Inquiry and Proposed Rule Making, 47 F.C.C.2d at 651, "sharing arrangements can range from the simple cooperative use of a single channel from one point to another, or the provision of discrete sub-channels derived from a voice grade channel, up to complex networks which the joint users may access from a number of points and which may be conditioned for the carriage of communications of a specialized nature."

21. To the extent that sharing arrangements are merely designed to permit users to pool their requirements so that users who are unable to utilize completely the physical capacity of a discrete circuit or line are able to join with others to avoid wasted capacity, the arrangements may be considered proper, since in principle any arrangement which contributes to the fullest, most effective, most

efficient, and most economical utilization of communications resources must be considered advantageous to the public interest.

22. The public interest is not served, however, by nominal sharing which is really a subterfuge for resale, and which permits an enterpreneur whose qualifications have never been evaluated by the Commission, who is unregulated by the Commission, and who has no innovative or useful purpose to serve other than to take advantage of price differentials, to divide a bandwidth capacity among his subscribers for a gainful purpose. A bulk communications offering, for example, may offer reduced rates per circuit because of a cost differential in providing service to large users, or because a large user may have a competitive alternative which will permit him to turn to some alternative source of communications such as private microwave if competitive rates are not offered to him. However, if an arbitrageur is permitted to acquire the bulk communications for sharing (i.e., resale), then the cost justification and the competitive necessity for the rates becomes illusory, and the contribution which should be realized from the sale of individual circuits becomes lost instead to the unregulated carrier.

23. To avoid the use of sharing as a subterfuge for resale, therefore, it is essential that the following requirements be observed:

(1) Each participant in the sharing must have a communications requirement of its own, so that his purpose in sharing

is to reduce his own communications costs.

(2) Participation in the enterprise should be on a cost-sharing, not-for-profit basis, the same basis as the cooperative use provisions in the Safety and Special Services, e.g., Sec. 89.14 (Public Safety), Sec. 91.9 (Industrial Radio Services), and 93.4 (Land Transportation). See Cooperative Sharing of Operational Fixed Stations, 4 F.C.C.2d 406 (1966), reconsideration denied, 7 F.C.C.2d 363 (1967).

24. Sharing or joint use will become less important and necessary with the passage of time as specialized carriers, who are more responsive than established carriers to the individualized needs of users, come to offer an increasing number of services and facility options quite similar to those sought by joint users. The Scheduled Metered Time Service offered by Southern Pacific, for example, permits a user to reduce his communications expenses and tailor his communications use to his needs by leasing a private line facility for only a limited period at a time, in effect "sharing" the facility with other customers through the customized service offered by Southern Pacific

IV. Items 9-10 -- Single Customer Provisions

25. Single customer provisions may be found by the Commission to be a just and reasonable classification where the specified groups of users possess unique attributes of unity and central administration which permit the user groups to be considered as a single entity for purposes of tariff application.

V. Items 11-12 -- Regulation of Sharing and Resale

26. Southern Pacific believes that the Commission should regulate the sharing arrangements involving customers and joint users of common carriers, in order to provide assurance that the arrangement is a bona fide sharing use and not a subterfuge for resale. Since the customers participating in the joint use are not licensees of the Commission, the Commission should spell out in detail the restrictions upon sharing, and look to the certificated common carrier to police the regulations and enforce the provisions of its tariff. The carrier may require joint users to file periodic reports, available for public inspection, setting forth in detail:

(1) The names of those who have shared the use of the facilities during the period;

(2) A brief statement as to the use of the facilities made by the joint users and an estimate of the approximate percentage of use by each participant; and

(3) A financial statement of operations of the shared facilities in sufficient detail to show the direct costs associated with the operation of the shared facilities during the reporting period, and the method of allocation of the direct costs among the joint users.

24. Southern Pacific recommends that the entities reselling communications services and facilities should be regulated under the

Commission's authority to issue certificates of convenience and necessity upon a showing of public need by an applicant legally, financially, technically, and otherwise qualified to operate as a communications common carrier for hire, with entry requirements fully as stringent as those imposed upon existing regulated carriers. Certificated carriers should be permitted resale; non-certificated entities should not be permitted to resell communications. It is premature at this time to determine whether the infusion of competition in the provision of common carrier services serves as an adequate substitute for full common carrier regulation. Until sufficient operating experience in a competitive environment has been gained, Southern Pacific recommends that the Commission fully regulate all certificated carriers in order to insure against anticompetitive practices, predatory rates, improper resale, and unlawful discrimination and preferences among users.

December 11, 1974

COMMENTS OF THE ASSOCIATED PRESS

The Associated Press (AP), by its attorneys, pursuant to ¶39 of the Commission's Notice of Inquiry and Proposed Rulemaking, 47 F.C.C.2d 644 (1974), and the Chief, Common Carrier Bureau's Order, 39 Fed. Reg. 39049 (1974), hereby submits its comments in the above entitled proceeding.

The Associated Press

The Associated Press is one of the principal suppliers to the nation's newspapers and broadcast stations of national, international, and regional news. AP is a non-profit cooperative whose membership includes more than 1,250 daily newspapers and more than 3,500 broadcast stations, many of which also subscribe to other news and supplemental news services.

AP's purpose is to gather and disseminate rapidly and accurately to its members news from all parts of the world. The operational philosophy of The Associated Press is set out in Article 1 of its By-laws. According to the By-laws:

> "The Associated Press is a mutual and cooperative association formed to gather with economy and efficiency an accurate and impartial report of the news. The union for a common aim and purpose of representatives of all shades of thought and opinion - political, social, economic, religious - is assurance the news gathered and distributed by The Associated Press shall be as objective and complete as human endeavor can make it."

As an example of the cooperative nature of AP, all AP members are obligated under AP By-laws to contribute to AP local news of spontaneous origin for transmission to other members throughout the cooperative.

As a mutual cooperative, AP is controlled by its constituent members. Revenue obtained by AP is spent for gathering and distributing news. AP has no stockholders, declares no dividends, and distributes no profits. All income is used to maintain, improve, and expand the news service.

The cost of collecting, exchanging, and transmitting the news service furnished by AP to its members, as well as all other expenses of AP, is apportioned among the members by the elected Board of Directors. Assessments are levied by the Board in a fair and equitable manner. The assessments of members are calculated only to meet expenses in accordance with AP's status as a non-profit cooperative.

The general news services of AP include both multiple and single wire services, depending upon the needs of the individual members served. A multiple wire service includes one wire providing in-depth reporting of general news of national and international significance, gathered in more than 100 countries, and additional wires providing news of state and regional interest, or special subject interest, such as sports and business news. A single wire service provides national and international news and appropriate state, regional, and special subject interest news on one wire.

To serve the needs of its broadcast members, AP provides continually revised news in a format suitable for immediate broadcast by radio and television stations. This format includes periodic news summaries written in the form of five and ten minute news scripts, urgent news bulletins on important events, in-depth coverage of important news, regional and local news pertaining to each member's own area, and a balance of sports, weather, financial news, and other news and news features. A similar but separate service is provided for CATV operators.

AP has recently supplemented its existing broadcast wire service with an audio news service known as "Associated Press Radio" or "APR." Through APR, AP makes available to its members a variety of audio news dispatches, including spot reports of news "actualities," headline packages, special short reports on agriculture and business, and regional newsfeeds based on news contributions by regional members. In addition, AP offers hourly newscast materials, which can be employed by subscribing stations in 30-, 90-, or 210-second segments, depending upon the subscribing stations' format preferences.

AP financial wires provide reporting and analysis of the nation's and the world's business, and tabulation of trading on all major United States security and commodity exchanges from open to close of every trading day. These services include complete and abbreviated daily and weekly stock lists at the close of trading and pre-closing complete and abbreviated lists throughout each trading day. The financial services are available to members on wires operating either at 66 words per minute or on Dataspeed circuits sending at 1,050 or 2,100 words per minute. These Dataspeed circuits are also used to transmit presidential texts and other important news documents. In most newspaper situations, a reperforating device connected to the wire generates a TeleTypeSetter (TTS) tape for use by the newspaper in automatic typesetting.

The special news wire category includes the sports wire (general and regional sports news), the race wire (horse race results), baseball play-by-play wires, and many other special wire circuits established by AP to serve individual needs of members of groups of members.

The AP wirephoto service provides a variety of pictures on regional, national, and international events, along with daily weather maps, news maps, sketches, and color separations to over 700 newspapers and television stations in the United States and Canada.

AP's Private Line Communications Services

To provide perishable news and news feature material to its members, AP is dependent upon an extensive network of private line services leased from AT&T which fall into four broad categories of circuitry: Dataspeed circuits carrying stock market tables to big city newspapers; the APR circuit, which carries AP's audio service to radio broadcasters; a telephotograph circuit; and a multiplexed voice grade circuit which transmits news information at telegraph speeds over a number of channels.

The principal vehicle for distributing Associated Press news to subscribing newspapers and broadcast stations is a 71,434 mile Carrier Transmission System employing voice grade circuits leased from AT&T. AP-owned equipment derives up to 25 individual 66 word-per-minute telegraph circuits from this channel. The network has 95 individual circuit sections, 53 of which provide a backbone of trunk mileage coast-to-coast and 42 of which extend the backbone to individual states or small groups of states in order to carry AP's news reports to all users.

AP also leases a special circuit used only for high-speed stock market table transmissions which employs an additional 18,061 miles of voice grade channels. The APR circuit comprises 11,000 miles of Series 2000 channels. A separate fourth circuit of Series 4000 telephotograph circuits covering 28,500 miles is devoted exclusively to picture collection and distribution.

AP provides the frequency-division multiplexing equipment used in its Carrier Transmission System. AP operates its own telegraph test rooms throughout the Carrier Transmission System to monitor and control the quality of signals received from and transmitted via the interexchange channels. AP also owns and maintains all of the transmission and receiving terminal equipment (including printers and reperforators) used in providing its services.

AP's "Shared Use" of Common Carrier Services and Facilities

Only a small portion of AP's circuitry is used for transmissions exclusively between AP locations, e.g., from AP's Washington bureau to AP headquarters in New York City. In most cases, AP performs its mission of gathering and disseminating news by transmissions from AP members to

AP or from AP to AP members. Thus, in a sense, AP members as "authorized users" of AP circuits, "share" the use of those circuits.

In addition, two of the derived telegraph channels of AP's Carrier Transmission System are used by subsidiaries of AP members supplying supplemental news wire services, the New York Times News service and the Washington Post/ Los Angeles Times news service, pursuant to a "joint use arrangement." These arrangements make appropriate use, on a cost sharing basis, of services and facilities of which AP has surplus capacity beyond that needed to provide its basic news services.

AP's Comments on the Commission's Specific Items of Inquiry

1. What is the justification for the restrictions on resale and third party traffic in the currently effective private line service of AT&T and Western Union?

Paragraph 15 of the Commission's Notice of Inquiry specifies three principal restrictions in the private line tariffs of AT&T and Western Union on the availability of private line service for resale or use by third parties. AP will address each of these provisions in turn. First, however, AP notes that at present it is not directly con-

COMMENTS OF
THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

The American Newspaper Publishers Association (ANPA), by its attorneys, pursuant to ¶39 of the Commission's Notice of Inquiry and Proposed Rulemaking, 47 F.C.C.2d 644 (1974), and the Chief, Common Carrier Bureau's Order, 39 Fed. Reg. 39049 (1974), hereby submits its comments in the above entitled proceeding.

The American Newspaper Publishers Association

The American Newspaper Publishers Association is a non-profit membership corporation comprised of more than 1,100 daily newspapers whose publications represent more than 90% of the total daily and Sunday circulation of newspapers published in the United States. The ANPA keeps itself and its members fully informed on all communications services used by newspapers, including press communications services and news wire services. In recent years ANPA has participated, on behalf of its members, in several FCC rate-making proceedings, including the Private Line Cases (Docket No. 11645), the Press Rate Case (Docket No. 15094), the General Telephone Rate Investigation (Docket No. 16258), the Telpak Sharing Case (Docket No. 17457), the Private Line/Telpak Case (Docket No. 18128), and the Hi/Lo Rate Case (Docket No. 19919). All of these proceedings in one way or another related to the adequacy of leased line facilities and rates for the dissemination of news.

The Utilization of Private Line Communications by the Press

Daily newspapers, with few exceptions, subscribe to one or more news wire services. The prime source of national and international news coverage for daily newspapers everywhere is one or both of the two principal news wire services, The Associated Press and United Press International. For smaller newspapers located outside of major urban areas one or both of these news wire services is often the only source of national and international news. The United States is the only country in the world with two competing national news wire services which provide complete national and international news coverage for newspapers and broadcasting stations.

In addition, United States newspapers have access to a variety of supplemental news services for specialized and interpretative articles far beyond the limited number of such services available in any other country. Indeed, at the present time more than thirty different news services are available to newspapers in all or parts of the United States. These include not only the two major U.S. wire services and supplemental and specialized U.S. news services, but also foreign-owned services such as those of the Reuters news agency and the Times of London.

Finally, many newspapers use private line services for internal purposes, such as to provide links to remotely located news bureaus, to transmit news copy, features, or photographs among members of a newspaper group, or even to transmit prepared copy from editorial offices to printing locations by use of sophisticated digital computer techniques.

The Public Interest in the Availability of Shared Communications Services for the Press

The importance of efficient, economical news wire services for the press has long been recognized. In 1910, Congress, in conferring regulatory authority on the ICC over interstate wire communications, approved continuation of preferential press rates and specifically authorized the separate press classification of service. This authorization was carried over in §201(b) of the Communications

Act of 1934 when authority over communications common carriers was transferred to the FCC. Until 1943 common carriers offered private line service to the press on favorable terms. On February 1 of that year the FCC, as an outgrowth of Docket No. 6468, approved the unification of commercial private line telegraph and press private line telegraph services on the basis of the structure of the press classification and reduced rates for both press and commercial services. See Transradio Press Service, 11 F.C.C. 377, 379 (1946).

The Commission's final decision in the Private Line Cases, 34 F.C.C. 217 (1963), which ordered AT&T and Western Union to increase substantially private line telegraph rates, posed an immediate and serious threat that the dissemination of news would be impaired. The Commission recognized this danger, excepted from its decision the private line telegraph and telephotograph services supplied for press use, and instituted a separate investigation of the charges to the press for private line telegraph and telephotograph service to determine whether the imposition of the same charges applicable to other users would significantly impair the widespread dissemination of news information. See 34 F.C.C. 1094 (1963).

During the next eight years, while these favorable press rates remained in effect, two major developments took place, as a result of efforts by the press, which enabled the press to adapt to the increases in telegraph rates without substantial financial hardship. First, AT&T amended its private line tariff to allow channels of lesser bandwidth to be derived from voice grade channels by customer provided equipment. Second, AT&T added to its tariff provision for joint use, that is, the sharing of a single private line channel by more than one user. These revisions then permitted the press to use innovative technology whereby more than 20 telegraph channels could be multiplexed and carried on one private line telephone circuit.

The Associated Press and United Press International, as well as other large, multi-wire news services, were able to take advantage of these tariff revisions and, by the use of multiplexing equipment, shift their communications networks from private line telegraph service to private line telephone service.

Many smaller, supplemental news services were able to continue operations by sharing the use of the larger services' channels. Arrangements such as this are possible where the customer does not require all of the telegraph channels it can derive from one voice grade channel for its own wires, and so can make the extra telegraph channels available to a line sharer. Also, in some instances, channels may be time-shared, i.e., two or more sharing news wire services use the telegraph channel at different times of day.

These sharing arrangements have made possible the diversity of news sources now available to the press, and have benefitted the economy generally by efficiently using communications resources, i.e., excess telegraph channels, which would otherwise go to waste.

With the advent of the threat of vastly increased private line rates for the press -- estimated at nearly $5 million per year -- as a result of AT&T's HiLo tariff, ANPA, newspapers, and the news wire services must aggressively explore all possible means of minimizing communications costs. One method under consideration is the possibility of expanded sharing of channels, whether by individual arrangements, or in the form of a press communications cooperative.

However, the present restrictions in the private line tariffs which limit sharing to voice and lesser grade circuits limit the extent to which further economies can now be achieved by combining telegraph channels. Also, the present charges embodied in the private line tariffs of $10.00 per station per month for joint use constitute another barrier to line sharing in some cases. In addition, the "use" regulations of present tariffs prohibiting third party traffic and limiting messages to those "to or from the customer" inhibit the possible development of the technology and cooperative organizations which might be able to serve the communications needs of the press on a combined basis with improved efficiency and lower costs.

Conclusions

In sum, the sharing by press customers of voice and lesser grade circuits now permitted by the tariffs has been of great benefit to the dissemination of the news. At a minimum, these arrangements should be permitted to continue and the unjustified "joint use" charges now levied should be eliminated. Moreover, the joint use principle should be extended to broader band facilities, at least for service to the press, as would be permitted by §201(b) of the Communications Act, or more generally to cooperative, industry-oriented ventures operating on a cost-sharing, non-profit basis. Sharing agreements of this sort should be left to the individual judgments of those entering them, and not be subject to FCC regulation or reporting requirements.

Finally, the Commission should require the basic carriers to eliminate unjustified tariff restrictions on the use of their services to the extent necessary to permit the press to engage in cooperative efforts to use communications facilities efficiently.

Respectfully submitted,

THE AMERICAN NEWSPAPER PUBLISHERS
ASSOCIATION

December 11, 1974

COMMENTS OF COMMODITY NEWS SERVICES, INC.

Commodity News Services, Inc. (CNS), by its attorneys, pursuant to ¶39 of the Commission's Notice of Inquiry and Proposed Rulemaking, 47 F.C.C.2d 644 (1974), and the Chief, Common Carrier Bureau's Order, 39 Fed. Reg. 39049 (1974), hereby submits its comments in the above entitled proceeding.

Commodity News Services, Inc.

Commodity News Services, Inc. provides specialized news wires for various segments of American agriculture and related businesses. Its headquarters are in Kansas City, Missouri. CNS is the successor to LFM News, Inc., Transportation News Ticker, Inc., and PAM News Corporation, whose networks have been integrated with those of CNS. CNS provides more than 3,300 subscribers with up-to-the-minute news and statistical information of agricultural and other commodity markets.

The services provided by CNS over its leased circuit consist of the following news wires: (1) LFM News, (2) Grain

Instant News, (3) Poultry and Egg News, (4) Commodity News Service, (5) Active Commodity Trading News, (6) Private Agricultural Markets, (7) Lumber Instant News, (8) Transportation News Ticker, (9) Cotton Exchange News Ticker, (10) Ridder News Service, and (11) the recently introduced Farm Radio News, which supplies agricultural and related news reports in a format suited for use by radio broadcast stations. Other channels of the CNS circuit are used for CNS internal editorial communications.

The news services provided by CNS serve the vital function of the immediate transmission of raw and analyzed specialized news data throughout the entire American agricultural market, both rural and urban.

CNS's Private Line Communications Services

CNS serves its customers exclusively through private leased line facilities. Substantially all of these facilities are provided by a 34,788 mile voice grade circuit which includes 3,032 service terminals. Only eight percent of this circuit uses duplex service. A few customers are served by telegraph grade services.

CNS uses its own equipment to multiplex its circuit into telegraph grade channels. These channels provide signals to teleprinter machines owned or leased by CNS at each customer's location. Prior to 1969 CNS used four telegraph grade circuits and leased teleprinters under the press rates then existing. In order to avoid the impact of the impending loss of press rates, CNS invested approximately four million dollars in teleprinter and multiplexing equipment and installation costs. This equipment was installed on the present voice grade circuit which was started in 1969.

CNS is limited in its ability to use telegraph circuits (Series 1000) economically since the livestock and poultry industries are concentrated in and around the major grain producing areas which provide them feed. This agricultural diversification requires that CNS offer more than one service in almost all areas by means of multiplexing a number of telegraph channels onto one voice grade channel. For example, one town in Iowa might have a grain elevator, a feed lot, an egg hatchery, a commodity broker, a radio station, and a commodity speculator each subscribing to one of six different services.

CNS's Interest in "Shared Use" of Common Carrier Services and Facilities

CNS seriously considered entering into line sharing, "joint use" arrangements in 1971 and 1972. When CNS was considering entering into line sharing, it had discussions with several brokerage houses with substantial commodities futures business and with several news organizations which were using their own telegraph grade circuits. The sharing would have involved a telegraph grade circuit throughout CNS's voice grade circuit. Since that time the threat of the bulk rate and HiLo tariffs has effectively prevented CNS from entering long-term contracts for sharing of its own circuit.

CNS has also considered abandoning its own circuit and sharing several channels on the circuit of another news wire organization. One of the prime obstacles to this type of arrangement has been the charge for each terminal of $10.00 per month for joint use and $50.00 for installation. Thus the common carrier charges for the initial switch-over of CNS's 3,032 terminals would be $151,600 and terminal charges would increase by $30,320 per month.

CNS's Comments on the Commission's Specific Items of Inquiry

> 1. What is the justification for the restrictions on resale and third party traffic in the currently effective private line service of AT&T and Western Union?

Paragraph 15 of the Commission's Notice of Inquiry specifies the principal restrictions in the private line tariffs of AT&T and Western Union on the availability of private line service for resale or use by third parties. CNS will discuss these provisions below. First, however, CNS notes that at present it is not directly concerned with the resale of common carrier services and facil-

COMMENTS OF THE
COMPUTER AND BUSINESS EQUIPMENT
MANUFACTURERS ASSOCIATION (CBEMA)

The Computer and Business Equipment Manufacturers Association (hereinafter "CBEMA"), by its attorneys, submits herewith its comments in response to the Commission's Notice of Inquiry and Proposed Rule Making, released July 5, 1974 (FCC 74-689) (hereinafter cited "Notice").

Preliminary Statement and Summary

1. As the Commission is aware, CBEMA is a trade association which has represented the computer and business equipment industry for the past half century. The Telecommunications Committee of CBEMA, whose membership comprises both equipment manufacturers and network users,[1] has a strong interest in the

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[1] Members of CBEMA's Telecommunications Committee include: Action Communication Systems, Inc.; Addressograph Multigraph Corporation; Burroughs Corporation; Control Data Corporation; Dictaphone Corporation; General Electric Company; Honeywell Information Systems, Inc.; IBM Corporation; NCR Corporation; Olivetti Corporation of America; Sanders Associates, Inc.; The Singer Company; Sperry/Univac; Xerox Corporation and 3M Company.

broadest possible availability of communications services consistent with necessary network protection. CBEMA has participated in various Commission proceedings, including the Docket 16979 Computer Inquiry, and other proceedings concerning both interconnection and common carrier services involved in the provision of information processing services.

2. The course ultimately chosen with respect to the use and resale of common carrier services is of concern to CBEMA and to its member companies. For any policies adopted in this proceeding will undoubtedly affect the nature and availability of communication services essential in the use of the telecommunications network for computer and information processing purposes. Moreover, to the extent that policies adopted in this proceeding impact the costs and availability of common carrier services to data communication users, the markets served by CBEMA's member companies will also be affected. It is against this background of CBEMA's interest and participation in Commission proceedings that the comments herein are offered.

3. By way of summary, CBEMA submits that, in light of the rapid evolution of communications technology in recent years and the dramatic expansion of user requirements, an overall review of present approaches to the provision of communications services is both timely and needed. While joint use, resale and the role of "middlemen" in the provision of communication services are the focus of ultimate interest, an initial examination of existing tariff limitations on both individual and joint users'

employment of carrier services should be made. Present restrictions on individuals' use are a significant determinant of what joint use is feasible today. And the effect of current restrictions on both individual and joint use of carrier services and facilities may directly influence determinations of need for particular types of "middleman" communication services.

4. Insofar as the role of "middlemen" is concerned, the Notice makes clear that the category of activities intended to be described are those devoted to "marketing, retailing, brokerage and related functions" in the provision of communication services. To that extent, CBEMA does not view the Notice to propose an alteration of either the basic Computer Inquiry distinctions between communication services and data processing services, or the policies there adopted relating to the latter. There is neither need nor warrant for reconsidering those policy determinations -- determinations which have fostered a rapid growth of needed data processing services dependent on telecommunications facilities for their employment. The wisdom of the Commission's approach to communications-dependent data processing services has been confirmed by recent experience. The present inquiry should focus on policy areas which have not been the subject of such recent exhaustive consideration and resolution as those covered in the Computer Inquiry.

5. Viewing the "middleman" functions to be considered herein as the provision of communication services, some guidance in the formulation of policy approaches can be drawn from historic experience, both in the communication area and in other fields of commerce. Where intermediaries have merely provided "pure brokerage" of basic carrier services -- where the same service is available directly from the carrier -- the appropriateness of such services on an unregulated basis has been viewed narrowly. Such an approach is evident in the early evolution of the communications field. Where "middlemen" have incorporated a basic carrier offering in a service not available directly from existing carriers, however, regulatory responses have been far more flexible. In the case of freight forwarders, for example, where service features have included more than simply transportation between two carrier locations, regulatory agencies have found such services to be valuable supplements to basic carrier services.

6. In those instances where regulation of such "middlemen" has been undertaken, regulatory supervision has primarily been designed to protect the using public, rather than any "competitive" interests of the existing carriers. The extent of supervision has been limited in most cases, and has been less than the degree to which existing carriers have been regulated in any event.

7. In formulating the approach it will ultimately pursue, the Commission must recognize that users are reliant on present service availabilities, and that there are bona fide carrier concerns which must be taken into account. But at the same time, the evolution of services in other areas of commerce suggests that intermediaries may serve significant public needs without unduly disruptive effects on existing carriers. To the extent that "middlemen" of communication services may increase both efficiency and flexibility in meeting user requirements, the concept is one deserving serious exploration.

Technological Advances and More Diverse User Requirements Support the Need For a Reevaluation of Commission Policies

8. As a general matter, the Notice herein represents perhaps the most far-reaching examination of the basic roles of those providing communication services and the users of such services in more than two decades. As the Commission has described it:

> [T]he basic question [is] whether, and under what conditions, subscribers of the various service offerings of communications common carriers should be allowed to resell such services to others or to participate with others in the sharing or joint use of such services, and, if so, whether and to what extent the Commission should regulate any such resale or shared use. [Notice, ¶1.]

9. The need for such an overall reevaluation of the present framework of communications services is, CBEMA submits, entirely appropriate at this point in time. Communications-related technology has evolved rapidly in recent years, and

the demand for more diverse and specialized communications-dependent services has expanded even more quickly. Confirmation of both factors is readily found in the record of such Commission proceedings as the Computer Inquiry and the Specialized Common Carrier Inquiry, to name but two. Even more recent reinforcement of both new technical capabilities and user demands is reflected, for example, in planned domestic satellite communications offerings, and in the "value-added" carrier proposals approved by the Commission.

10. The Commission has recognized the need for a continuing evaluation of the dynamic evolution in the communications field in recent years. Indeed, in its Notice herein, the Commission has stated its belief "that both established carriers and the new entities which offer or propose to offer specialized services can contribute to breakthroughs in communications technology and plans for more efficient application of new and existing technology." (Notice, ¶3.)

11. In CBEMA's view, the Commission's view is particularly appropriate in the prevailing politico-economic climate. Given the need for conservation of resources, it is extremely important that maximum utilization be made of existing facilities. And to the extent that a broadened approach to marketing and employment of present network capabilities may increase that efficiency, careful evaluation of available alternatives to present network usage approaches is warranted. Moreover, emphasis on increased efficiency in network use may have other favorable consequences. If more efficient use of present plant facilities can

be accomplished, the need for new carrier construction may be correspondingly reduced. The requirement for carriers to borrow capital funds for new construction may thus be diminished -- a result which may lessen potential carrier costs and, ultimately, the rate burden borne by communications customers. The impact of prevailing inflationary pressures on the public alone suggests the desirability of such a result.

12. In exploring possible alternatives to the present approach to providing retail communications services, it should also be remembered that there are legitimate carrier concerns deserving attention. The U.S. telecommunications network is deservedly envied worldwide. And the operational integrity of that network must continue to be safeguarded. High quality transmission capabilities are particularly required by CBEMA's member companies and their customers. CBEMA's interests, therefore, include a preservation of network operational quality. And any new policies ultimately adopted in this proceeding should insure that no significant deterioration in network operations will result.

13. As noted initially, the scope of the Notice herein is extraordinarily broad. Many of the issues raised can be responded to more meaningfully by others having a greater familiarity with the impact of current limitations on their own particular circumstances. CBEMA feels that it can most constructively contribute to the proceeding by offering its

comments from the standpoint of communications users, and of those whose customers are communications users. In an effort to present its comments in a practical framework, CBEMA will focus its attention initially on the AT&T tariffs, and in general, their allowances and present limitations.[2/]

Evaluation of the Appropriate Role of the Communications "Middleman" Requires an Examination of Limitations on Present Services Available to Users.

14. Basic to determining the need for, or the desirability of, "brokerage" or "resale" of communications services is an awareness of what services are presently available to users. CBEMA urges that the Commission fully explore this fundamental question in its deliberations. For the nature and extent of users' employment of existing carrier offerings bear directly on the present feasibility of joint usage -- i.e., the limitations on individual usage also apply to joint or shared use. Moreover, they represent as well significant elements bearing on the need for intermediaries of communication services.

15. With respect to individual users, all of AT&T's services are at least nominally available to individual users

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[2/] In so narrowing the focus of its comments, CBEMA has not undertaken to address the tariff restrictions on resale or joint and shared use of either the international or the non-Bell carriers. To the extent that the issues in this proceeding also relate to the provision of such other communication services, however, they are appropriate for consideration herein as well.

in one fashion or another. Under present AT&T tariff provisions, customers buying services for their own use, or for those of affiliated companies in which they have at least a 50 percent interest, are the typical and most readily accommodated users. To the extent that existing customer usage is dependent on present tariff allowances, and since the evolution of current tariff availabilities has been predicated on basic business realities, the extent of service now available should be preserved. Resolution of the issues in this proceeding requires instead underlying determinations whether current tariff limitations on the manner in which users may employ carrier services should be modified or eliminated to provide greater user flexibility.

16. With respect to tariffed services for individual use, there are, in some instances, limitations on what such customers may do to meet their own internal communications requirements with facilities or services obtained from the carrier. The most pervasive restriction, of course, is the general limitation on connection of customer-provided equipment -- equipment which might permit a more full and flexible use of the carrier service involved. That subject, however, is being considered elsewhere, and CBEMA will not here seek to argue the matter in this proceeding.

17. Not unrelated, however, are conditions on the use of certain of the AT&T services. Series 8000 service, for example, provides a wideband data channel. As presently tariffed, the service is available only if the customer also takes AT&T Series 300 datasets for use with the channel. The service can be used as one or more wideband channels terminating in a Series 300 dataset. Alternatively, at the customer's option, the channel will be subdivided into Series 2000, 3000 or 4000 channels, with each such channel terminated in a demarcation strip at the customer's premises, to which customer terminal equipment may in turn be attached.

18. From a user's standpoint, the requirement to take AT&T's datasets seems wholly unnecessary to a legitimate use of the service. Alternative equipment is available from other suppliers, and should be able to be employed by customers. Moreover, limiting users to the AT&T dataset may inhibit full utilization of the channel. Analogy to the history of the Series 3002 channels (voice grade channels conditioned for data) will illustrate the point. Initially, AT&T provided a dataset for use with 3002 channels -- a device capable of handling 2.4 kilobits. Because of the need for a greater speed and efficiency, and since such equipment was not available from the carrier, independent manufacturers developed more sophisticated datasets

capable of handling 9.6 kilobits over the channel. The result, therefore, was a fourfold improvement in the efficiency of channel utilization, without any adverse effect on the network. With respect to Series 8000 -- a channel approximately 48 KHz wide -- the AT&T Series 300 datasets are capable of handling 50 kilobits. However, without the inhibiting requirement to take that dataset, it is likely that an improvement in dataset speed -- and hence a more efficient use of the channel -- could be achieved comparable to that accomplished with respect to Series 3000.

19. Limitations on the use of the Series 8000 service may be a further impediment to more flexible and efficient use of the channel. There is no apparent reason why customers for a Series 8000 channel, arranged for wideband, should not be permitted to utilize the entire channel in any technical fashion they choose -- to multiplex or to subdivide it in a manner which would best suit the particular user's requirements, and would most efficiently employ the channel involved. Such a flexibility would be advantageous to users, with no apparent adverse consequences to the carrier.

20. Similar limitations on the use of Series 1006 channels exist. As with Series 8000, a subscriber for Series 1006 must take an AT&T dataset for use of that 150-bit channel.

Here, too, there is no reason evident why other datasets should not be permitted to be used. Indeed, there is no comparable restriction on the use of 1001, 1003 and 1005 channels. And there is no logical reason why a distinction has been drawn between the extent of use of those channels and the 1006 channels.

21. Beyond inhibitions on an individual's use of particular services for the specific purpose designate by tariff, certain types of channels are simply unavailable for a variety of business uses. For example, the equivalent of a television grade channel cannot be subdivided by a customer for non-television tranmissions, even though an efficient use of such a channel -- and one well suited to particular customer's requirements -- may be accomplished quite readily.

22. In these and other respects, individual users' employment of carrier services and facilities are restricted in ways which have never been adequately explained by the carriers. As indicated earlier, arbitrary limitations may not simply preclude individual users' ability to satisfy their own communications needs. They may preclude the feasible joint use of particular services as well, and may in significant part underlie the demand for particular "middleman" services. The

Commission, therefore, should include a consideration of such individual use restrictions in its overall review of available services. And in that review, the Commission should seek to promote maximum flexibility in users' ability to meet their communications requirements, subject only to such limitations as may be needed to preserve the quality of network performance.

23. A critical review of the current tariff approach to joint and shared use of carrier services and facilities is also needed. For in this area particularly, there are few discernably consistent bases for existing tariff limitations. Under a number of AT&T tariffed offerings, such as the Series 1000, 2000, 3000, 4000 and the DDS services, some form of joint use is provided for. Each of the joint users must have at least one station on his premises, and AT&T directly bills each joint user a portion of the total charges, based on the customer's instruction.

24. Even in these services, however -- and beyond those limitations which derive from individual use prohibitions -- the extent of joint use is not without restrictions. For example, joint use is prohibited with respect to FX, CCSA and TELPAK. The disadvantages of that restriction can be illustrated by the following example: Company A has an FX line between its New York office PBX and the telco's Washington, D.C. central office (CO), form which the company can reach either its Washington PBX or

any other Washington station. Company B, with offices in New York and Washington, would like to use the FX line at night -- when Company A has no need for the facilities. However, the tariffs preclude the joint use of FX lines. Company B can use tie lines between its New York location and the New York end of the FX line, and between its Washington location and a point on the FX line before it reaches the telco's Washington CO. However, in such a configuration, Company B cannot communicate past its Washington PBX, and can reach no other station in Washington. The loss of flexibility is more than evident. And there is no clear reason why such restrictions are needed.

25. In a variety of AT&T services (Series 6000, 7000, 8000, 10000, MTS and WATS), joint use is not permitted. No comprehensive explanation of the reason for such a prohibition has ever been advanced. Moreover, in the TELPAK offering, there is an anachronism which raises questions about the existence of any technical reasons for the limitations: One of the TELPAK circuits can be jointly used, while the remainder cannot. Another oddity exists in that the AT&T tariffs do not permit joint use of CCSA access lines. Yet joint use of Series 2000 and 3000 services -- which have essentially the same performance characteristics when used in tandem dial networks -- is permitted.

26. In this and other respects, there are serious questions regarding the bases for joint use restrictions in various of the AT&T services. It is entirely unclear to what extent those restrictions, or other joint use-related requirements, whatever their

initial rationale, are necessary or desirable at this time. To the extent that, on examination, such limitations are determined to be arbitrary, or to interfere with a more efficient use of carrier facilities, the validity of such limitations should be reevaluated.

27. As an overall matter, therefore, a careful review of existing tariffed services is a necessary first step in resolving the issues in this proceeding. To that end, paragraph 31 of the Commission's Notice poses specific questions designed to elicit the carriers' justification for current tariff restrictions on resale, joint and shared use. (See, e.g., questions 1, 5.) In CBEMA's view, such information is essential to an effort to develop any meaningful policy approach. Moreover, to the extent that the carriers are most familiar with their own tariffs, it should not be left to other parties to establish the entirety of tariff restrictions which are pertinent to this inquiry. Rather, what is needed as a first step is a complete statement by the carriers -- a matrix, if you will -- of all current use limitations in their respective tariffs, on a service-by-service basis, and an item-by-item explanation of the reasons for each limitation. Only in that fashion, CBEMA submits, will the Commission be assured of a complete understanding of the rationale for the current structure of carrier offerings. And it is only in the context of such a comprehensive (even if brief)

itemization that other parties will be able to focus their comments in a more productive manner. It is CBEMA's hope that as a part of their initial comments, the carriers will furnish such information in a comprehensive fashion. To the extent that they do not, however, the Commission should immediately direct the carriers to file a listing of current tariff restrictions on use of carrier facilities prior to the second round of filings in this proceeding. The carriers' reasons for current tariff limitations are critical to any final Commission determinations in this proceeding. Neither the Commission nor the parties should be left to guess what those reasons are.

The Appropriate Role of the "Middleman" in Providing Communications Services Should Both Accommodate Legitimate User Needs and Recognize the Practical Consequences of Regulatory Supervision.

28. As the Commission pointed out, underlying the resolution of the more specific questions posed in the *Notice* is a fundamental need to define the role of the "middleman" in the provision of communications services:

> While the middleman has assumed an important role in nearly all aspects of commerce throughout our nation's history, in the field of communications it has been the tradition, generally, that the carriers owning and operating transmission facilities supply a complete communications service directly to the ultimate user. Only relatively recently has this tradition, exemplified in the tariffs of the established carriers, been questioned.

(*Notice*, ¶1.)

29. The task the Commission has set for itself is an extremely complex and important one. Simply defining the category of "middlemen" in an industry where none has yet been formally recognized is difficult enough. Attempting to determine as well what the regulatory relationship to that category should be requires even more complicated considerations. The Commission has correctly observed:

> Public enjoyment of state-of-the-art communications technology and full utilization of existing capacity may . . . require that independent enterprises devoted to marketing, retailing, brokerage and related functions be given a greater role in the communications industry.

(Notice, ¶ 3.) Yet care must be exercised in deciding what degree of regulatory supervision will be exercised in this regard. For while the provision of any communication services by "middlemen" must include a due regard for carrier and public interests in existing network operations, unnecessary restraints on the development of such new services may well be self-defeating.

30. In considering the direction which any new policy approaches should take, it is important to delineate as carefully as possible the nature of the communications-related functions involved. For undefined catchwords like "brokerage", "middleman" and "resale" often tend to obscure significant distinctions, or to create distinctions where none exist. In CBEMA's view, initial efforts should be directed to determining at least in general terms, the types of activities with which the Commission is here

concerned. A precise definition of such activities may not be possible at this juncture. Perhaps the most that can affirmatively be said with certainty is that "middleman" services within the scope of this inquiry include those activities which are essentially in aid of communications by others.

31. What may be more feasible at this point is to attempt a description of those types of activity not the subject of inquiry. Where the information processing field is concerned, for example, the Commission's Notice has properly referred to the distinctions drawn in the Computer Inquiry between data processing and communications. In the Computer Inquiry, the Commission specifically eschewed the regulation of data processing services as such. And the Notice in this proceeding indicates no intention to alter that determination. Thus, such services as remote access data processing are not included in the general category of "middleman" communication activities which we understand this proceeding to be examining.

32. Moreover, as we read the Notice, there is no contemplated revision of the Computer Inquiry's differentiation between hybrid data processing and hybrid communications, or the determination there that hybrid data processing services which include communications components directly related to the provision of such services would not be subjected to regulatory supervision. In the Computer Inquiry, of course, the Commission distinguished between hybrid data processing services and hybrid communication services -- a distinction dependent on the application of a "primary purpose" test. Where hybrid data processing services

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were involved, the Commission affirmatively decided that complete regulatory forebearance was in the public interest:

> . . . we believe that the imposition of regulatory constraints over what is clearly a data processing hybrid offering, even though it contains communications elements which are an integral part of and an incidental feature thereof, would tend to inhibit flexibility in the development and dissemination of such valuable offerings and thus would be contrary to the public interest. In essence, we recognize no overriding public interest requirement at this time to regulate a service which, due to its nature, except for incidental and peripheral communications elements, is appropriately offered in the existing competitive environment.

(28 F.C.C.2d at 278.) Where hybrid communication services were involved, however, such activities were found to "warrant appropriate regulatory treatment as common carrier services under the Act." Ibid. The Commission declined to bind itself to any particular form of regulatory treatment, noting instead that it could "exercise appropriate discretion as to the methods and policies that will best serve the public interest in the regulation of hybrid communication services." Ibid.

33. In its Notice herein, the Commission has indicated no intent to modify the determinations made in the Computer Inquiry. Rather, it appears that the Notice is intended instead to consider those "independent enterprises devoted to marketing, retailing, brokerage and related functions" in the provision of communication services per se. (Notice, ¶3.) And it is in that context that CBEMA's comments herein should be viewed.

A. The Desirability of Reselling Unaltered Carrier Services Has Been Viewed Narrowly.

34. With respect to the communications-related activities which are the subject in this inquiry, there appear to be at least two differentiable, generic categories of activities. The first category might be described as including those entities which are essentially "retailers" of "bulk" communication services furnished by existing carriers. An illustrative hypothetical might be a company which leased TELPAK lines from AT&T and subleased channels to low-volume users at a rate less than AT&T's individual channel rate. The fundamental nature of the service involved remains unchanged insofar as the ultimate user is concerned; the "middleman" in that case introduces only a cost advantage over obtaining essentially the same service directly from the carrier.

35. The second general category comprises those entities which incorporate a basic carrier service into a service offering of their own. The service which the ultimate user receives is different from that available directly from the carrier.

36. In the real world, of course, there may not be a clean dichotomy between the two categories described. However, there is at least a conceptual basis for distinction. And while the Commission may not here decide that the differentiation warrants differing regulatory consequences for each category, historically, that differentiation appears to have been the basis for varying regulatory approaches.

37. With respect to the first category, it appears that simple retailing of basic regulated services on an unregulated basis has been rather uniformly rejected by regulatory agencies. With respect to the communications field, the origins of resale limitations in current carrier tariffs seem traceable as far back as the mid-to-late 19th century. Even at that early time, AT&T and the major telegraph companies, Western Union and Postal Telegraph Co., offered private wire service. And the contracts for private wire service in standard use fifty years before Federal regulation of interstate wire and telephone services, contained restrictive clauses designed to prevent a party from leasing such services for the purpose of selling communications services.[3]

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[3] Explaining its private wire offering in a 1934 FCC investigation (Telegraph Division Order No. 12, Docket 2639), Postal stated that "facilities [are] leased for the sole use of the party specifically named in the contract, to be used only for purposes of [his own] communications between the stations designated by him." Postal Brief, Docket 2639, at 3. Justifying its restrictions on private wires in the same FCC proceeding Western Union asserted, "Telegraph companies have an obvious but proper selfish interest to serve in restricting and policing the use made of leased circuits, for the protection of their primary [public] message business." Western Union Brief, Docket 2639, at 7.

While AT&T offered only one telegraph service in that time period, private wire service, numerous telephone services including private telephone lines and PBX facilities, were also offered through the Bell System local affiliates. Contracts for AT&T private wire and telephone services contained the standard restrictive clauses designed to prevent resale: the facilities were leased only for the lessee's own communications needs; transmission, receipt or delivery of communications for others or acceptance of any compensation for communications services was prohibited. AT&T Brief, Docket 2639, at 32.

38. It appears that there has never been a comprehensive analysis by a regulatory agency of the origins, rationale and justification for carrier resale prohibitions. In 1918, for example, the Interstate Commerce Commission investigated the private wire offerings of Western Union, Postal and AT&T, the telegraph common carriers brought under ICC jurisdiction by the 1910 amendment to §1 of the Interstate Commerce Act. In its report, however, 50 I.C.C. 731 (1918), the Commission approved without detailed analysis the private line offerings with contract restrictions on resale, but ordered the carriers to police their restrictions more carefully to prevent the abuse of private lines by large grain brokers, which had prompted complaints by small brokers and the ICC inquiry. 50 I.C.C. at 763. In referring to the contract restrictions on resale of private wire service, the Commission did find such prohibitions to be necessary to implement the private nature of the service and to avoid the carriers having to lease wires to their competitors. The theory that the companies must offer private wires to any member of the public, including telegraph middlemen, was rejected, the Commission holding that the carriers had no obligation to offer private lines to competing brokers and middlemen, since such brokers did not serve any significant purpose in the efficient

transmission of messages.[4]

39. Similarly, in 1934, a general inquiry was initiated into all classes of telegraph service not authorized specifically by the then-new Communications Act. Order No. 12 of the Commission's Telegraph Division, 1 F.C.C. 88 (1934), requested all telegraph carriers to justify their service offerings and to detail the rates and income derived. While the carriers' responses were lengthy, and at times controversial, the matter of resale prohibitions was never treated by the Telephone Division or the FCC in any published decision or opinion. See Docket 2639, 1934-37.

40. The main focus of reported dispute over simple "retailing" of tariffed communication services centered on the early practice by some hotels of imposing a surcharge for placing outgoing telephone calls. As early as 1918, Massachusetts specifically undertook to prohibit such charges for telephone service. Re Hotel Telephone Service and Rates, P.U.R. 1919A 190 (Mass. Pub. Serv. Comm'n, 1918). And the Massachusetts ruling was quickly followed by the state of New York. Connolly v. Burleson, P.U.R. 1920C 243 (N.Y. Pub. Serv. Comm'n, 1920). In both instances, the regu-

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[4] See, e.g., 55 I.C.C. at 764:

> . . . it seemed entirely proper and, from a practical standpoint, necessary in the interest of business to apply some restriction to the services . . . . Respondents are justified in inserting in the contract for private wire services a provision restricting the use of instruments and facilities provided to the transmission of messages concerning the business of lessee or lessees and providing that messages shall not be transmitted for other persons or firms.

latory agencies saw unregulated hotels charging users for regulated services to be inconsistent with the statutory scheme of regulatory control over the provision of telephone services, and to represent a potentially serious erosion of their jurisdiction. Moreover, it was felt that lost revenues for the availability of telephone service would inevitably impact the general public in the form of higher charges. See also Highway Emergency Service, Inc. v. Bell Tel. Co. of Pennsylvania, P.U.R. 1924B 843 (Pa. Pub. Serv. Comm'n, 1924).

41. The New York Public Service Commission extended its ban on resale of telephone services to office building operators in Gelsam Realty v. New York Tel. Co., P.U.R. 1929A 224 (N.Y. P.S.C. 1928). In Gelsam Realty, the carriers had argued that a direct relationship between themselves and telephone users was essential to efficient service, maintenance and billing. The Commission agreed, pointing to the adverse consequences it saw resulting from resale of telephone service to tenants: (1) a third party would stand between the telephone company and its users; (2) that third party would have control of telephone equipment, subject only to its own judgment of safety and necessity in providing and operating the equipment; (3) the Commission would have no control over the third party for the protection of customers ("service complaints would undoubtedly multiply with very little chance of reasonable or timely correction and adjustment"); and (4) there would be no limit on such third parties once the practice was authorized. Id. at 227.

42. Gelsam Realty became a watershed decision, subsequently relied on, for example, in 1015 Chestnut St. Corp. v. Bell Tel. Co. of Pennsylvania, P.U.R. 1931A 19 (Pa. Pub. Serv. Comm'n); Clerf v. Bell Tel. Co. of Pennsylvania, 44 P.U.R. NS 74 (Pa. Pub. Util. Comm'n, 1942); Williams & Palmer, Inc. v. Southwestern Bell Tel. Co., 70 P.U.R. NS 35 (Mo. Pub. Serv. Comm'n, 1947); and Building Industries Exhibit, Inc. v. Public Utilities Comm'n, 80 N.E.2d 837 (Ohio, 1948).[5/]

43. At the federal level, in Special Telephone Charges by Hotels, 10 F.C.C. 252 (1943), the FCC found such hotel charges to be extra charges for telephone service, rather than compensation for secretarial services, because they were based on the telephone toll price. The hotel charges were found to violate resale restrictions intended to protect the public from discriminatory rates and services. 10 F.C.C. at 262. Commenting on the undesirability of resale of telephone services, the Commission noted (ibid):

> If the collection of such charges were not subjected to regulatory control, a subscriber, or anyone else other than the telephone company, who is permitted by the telephone company to control access to the use of a telephone, could

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5/ In addition to the reasons against resale articulated in Gelsam Realty the state commissions expressed the view that existence of middlemen invariably meant higher rates and poorer service for the public: "resale of service affects the pocketbooks of service users", Clerf v. Bell of Pennsylvania; "middlemen are not a necessity or a convenience" in rendering telephone service, 1015 Chestnut St. Corp. No analysis in support of these assertions, however, was offered by the deciding agencies.

> freely resell interstate and foreign telephone service, imposing any charges of his own on such use. This would mean at least a partial nullification of effective public regulation of charges for interstate and foreign communication service, for there would then be a serious hiatus in the safeguards against excessive and discriminatory charges to the using public. A hiatus of this nature would be squarely contrary to the intention evidenced in the Communications Act of 1934 that there be comprehensive regulation of charges for interstate and foreign communication services.[6]

44. Where the first category of "middleman" activity has been involved, therefore -- the rather straightforward retailing of services otherwise available directly from a carrier -- what precedents there are in the communications field indicate a reluctance to permit the intervention of an unregulated intermediary between the carrier and its customers.

B. Regulatory Responses to Services Which Incorporate Basic Carrier Offering, but Which Also Include Other Advantages, Have Been More Flexible.

45. With respect to the second "middleman" category described earlier, however -- where basic carrier offerings are incorporated into communication services not directly available from the carrier -- there appears to be a different historic

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[6] In Ambassador, Inc. v. United States, 325 U.S. 317 (1945), the Supreme Court upheld implementing injunctions obtained by the FCC against major hotels in New York and Washington. In approving the FCC's actions and order to file tariffs, the Court noted in general terms the public utility practice of prohibiting resale of services as a means of protecting the telephone companies, but the court failed to address the merits of the resale tariff, leaving that discussion to the responsible agencies. 325 U.S. at 321-22.

evolution involved. The communications field is one where the appearance of various types of "middlemen" providing communication services per se is a relatively recent phenomenon. For example, only within the past year has the Commission granted authorizations to "value added" carriers. Similarly, questions regarding the carrier status of entities offering "shared" use of sophisticated communications networks have surfaced only in the recent past.

46. As the Commission's Notice herein points out, however, in other fields of commerce, the "middleman" has long been a recognized fact. And in most instances, "middlemen" have been either tolerated or encouraged by the responsible regulatory agencies where the service they provided ultimate users included some element not available directly from the "underlying" common carrier. To what extent such "middlemen" have been subject to regulatory supervision has varied. But more often than not, "middlemen" have been regulated to a lesser degree than the carriers themselves. And the extent of regulation has been more directly related to the potential for injury to the using public, rather than to the need for protecting carriers from the competitive effects of "middleman" operations.

47. A prime example of the evolution of "middlemen" in interstate commerce is that relating to rail freight forwarders.

Freight forwarders entered the transportation market with the railroads, consolidating small freight shipments into carload lots, shipping them by rail to points of destination and there separating them for private delivery. By compiling carload lots, the forwarders paid the railroads the published carload rate; they charged the public a rate above the carload tariff but below the railroad's less-than-carload rate. The public received pick-up and delivery service, shipment by the fastest possible schedule and a cheaper rate. The forwarders were considered agents of the shipper, not common carriers. They were seen as offering a valuable public service and became a significant element in the movement of goods by rail.

48. An early competitive response by the railroads -- which were anxious to recapture the forwarders' traffic at the carriers' normal less-than-carload rate -- was a refusal to carry goods offered by freight forwarders on the grounds that the carriers were not required to carry freight of competitors which undercut their revenues. The I.C.C. ruled the prohibition an unlawful discrimination against small shippers and their agents. California Commercial Ass'n v. Wells, Fargo & Co., 14 I.C.C. 422 (1910).

49. While the carriers subsequently obtained an injunction against enforcement of the I.C.C. ruling, the injunction was ultimately overturned by the Supreme Court in the Freight Forwarders Case, Delaware, L. & W. Railway Co. v. United States, 220

U.S. 235 (1910). Affirming the Commission, the Supreme Court held that the forwarders were entitled to use the published rate because the railroads were forbidden to discriminate according to ownership of goods. The Court reasoned that attempts to distinguish freight forwarders from the general public were doomed to failure since anyone could compile freight and the service was in great demand. Moreover, enforcement of less than carload rates against forwarders would create unlawful preferences for large shippers and disguised forwarders and disrupt the normal course of trade. 220 U.S. at 239.

50. The evolution of "middlemen" in the field of air freight transport is similar to that of the rail freight forwarders. Following its authorizing REA to provide air express service in the early 1940's[7] the CAB undertook an examination of the growth of air freight forwarders, and the public need for such services. Air Freight Forwarders Case, 9 C.A.B. 473 (1948). The Board found that air freight forwarders held themselves out as offering an air transportation service, and thus they were required to obtain CAB authorization as indirect air carriers. The Board held further that a great need existed for the forwarder service of pick-up and delivery, selection of routes and carriers, through bills of lading and consolidation of goods into efficient shipments. 9 C.A.B. at 490. Since the market was

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[7] Railway Express Agency Grandfather Certificate, 2 C.A.B. 531 (1941); Railway Express Agreement, 4 C.A.B. 157 (1943).

unlimited, and many applications had been received for this traditionally competitive business, the Board granted letters of registration to every applicant that had shown sufficient personnel and insurance to offer a reliable service. Detailed requirements for forwarders permission were prescribed in CAB regulations. See 14 C.F.R. Part 296 (1974).

51. The Air Freight Forwarders Case was litigated vigorously by the airlines, who urged the Board not to license competitors who, they asserted, charged higher prices to the public for the same airline freight service. The airlines pointed to the abuses which led to regulation of surface freight forwarders and argued that the air forwarders would engage in the same type of cream-skimming service, with its resultant pressure on the airlines for lower rates or preferences. 9 C.A.B. at 495. The Board agreed that abuses were possible, but it decided to check abuses as they arose. The Board found that the forwarders offered more and better ground services than the airlines, and that the forwarders had a greater incentive to develop and expand the entire air freight market. In view of the projected market growth for the service and the benefits to the public from competitive efforts, a majority of the Board ruled that air freight forwarders were not duplicative of airline freight departments, but were a needed service to the public. 9 C.A.B. at 500.

C. The Degree of Regulation of "Middlemen" Has Generally Been Less Than That of Monopoly Carriers.

52. As indicated earlier, the extent to which "middlemen" have been regulated in their fields has been more limited than the degree of regulation of the pre-existing carriers in those fields. And in the instance of the two types of "middlemen" referred to above, regulatory supervision has been imposed as a result of abuses potentially injurious to the public. For example, during the years after the Supreme Court Freight Forwarders Case, the rail freight forwarders dramatically expanded their position in the transportation market, moving freight equal to 45% of the railroads' less-than-carload traffic. Freight Forwarding Investigation, 229 I.C.C. 201, 217 (1938). As found by the ICC in its 1938 Investigation, this dominance of freight forwarders over easily assembled high-tariff goods forced the railroads to offer a variety of special arrangements to the forwarders in return for their patronage. The railroads would make special stops to unload part of a shipment, send smaller cars to the forwarders so that a carload was easier to assemble, split the transportation or delivery of a carload so that the railroads actually carried two less-than-carload shipments at the rate of one carload, and bear part of the cost of assembling, loading and unloading forwarders' traffic, all at rates below compensable levels. 229 I.C.C. at 221-257.

53. As a result of the documenting of such abuses, and in light of the ICC's ruling that the forwarders were not common carriers required to offer services pursuant to tariff,[8] Congress enacted Part IV of the Interstate Commerce Act in 1942, 49 U.S.C. Ch. 13 §§1001 ff *et seq*. Under that statute, the ICC issues a permit to any company not grandfathered by reason of operations prior to the effective date of the Act which is "ready, able and willing" to offer rail freight forwarding service, regardless of the area served or the traffic involved. 49 U.S.C. §1010. The forwarders are forbidden to discriminate in service or to receive or offer rebates or preferences in tariffs and charges; and they are to operate under published tariffs which the Commission can suspend, modify or investigate, on complaint or its own motion. Tariffs can be amended on 30 days' notice unless a suspension is ordered. §§ 1005, 1006. Finally, the forwarders are to keep records and accounts as the Commission directs and to carry sufficient insurance to protect the public. §§ 1012, 1006a, 1011. This basic legislation has not been modified, and forwarders continue to operate under its relatively light supervision.

54. With respect to the regulation of air freight forwarders, current CAB rules provide that an application for a letter of registration must contain the names of officers and directors (none of whom may be connected with a scheduled airline), the points to be served, the financial status of the company and

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[8] See 8 M.C.C. 211 (1938); *Acme Fast Freight v. United States*, 30 F.Supp. 968 (S.D. N.Y.), *aff'd per curiam*, 309 U.S. 638 (1940).

the charges to be made. 14 C.F.R. Part 296. "Financial, operating and insurance" reports are required to be filed periodically with the Board (14 C.F.R. Part 244), and the forwarders are required to abide by filed tariffs with no rebates or discrimination in service. The Board retains the authority to suspend or modify tariffs, which are normally effective on 30 days' notice.

55. In fact, the Board has rarely challenged the tariffs of a freight forwarder. As it explained in Order No. 74-7-117, dismissing a complaint that the tariffs of Emery Air Freight Corp. were too high:

> The Board has permitted freight forwarder managements considerable flexibility as to the level of their rates, in recognition of the fact that the Board does not limit the number of forwarders desiring to conduct business in particular markets, and thus the forces of competition will apply to the rates and services of forwarders. A shipper in a particular market is free to compare the rates of the various direct carriers and forwarders operating in that market in order to determine whether the services of a forwarder or a direct carrier best suit his needs.
>
> In the instant case, for example, the complainant may use the services of the direct air carrier rather than the forwarder if he feels the forwarder's rates are too high.
>
> In the circumstances, we do not believe the complaint sets forth facts warranting investigation.

C.A.B. Order No. 74-7-117, July, 1974 at 2.

56. From the foregoing, it can be seen that this Commission has broad latitude in considering the appropriate role of "middlemen" of communication services, and in determining the course of

any policy approach which may appear warranted in that regard. Prior decisions in the communications field have not dealt in any comprehensive fashion with the provision of communications services not available directly from existing communication carriers. In other fields of commerce, such "middleman" services have been permitted where a public need has been found, and regulatory supervision has generally been the minimum necessary to protect the public from abusive practices.

57. Against the background of recent developments in the communications field, and increasingly diverse user demands, there may well be significant public needs which can best be met by the availability of communication services per se from "middlemen." And presumably the record developed in this proceeding will serve to highlight the nature of such needs as may presently exist. In evaluating the issues to be resolved herein, the Commission must consider the potential impact of "middleman" communication services on the existing carriers. The nature and extent of such impact is best addressed in the first instance by the carriers themselves. And we assume that in their comments herein, the carriers will detail any adverse consequences which they may perceive.

58. At the same time, however, and with due regard for carrier concerns, if communication services provided by "middlemen" can be shown to serve significant public needs, the question of whether to permit the offering of such services should not be

obscured by a preoccupation with the specific regulatory framework within which such services would be offered. The lesson to be drawn from experience in other fields is that there is a likely need for the communications "middleman", that it can be met without serious detriment to the present framework of basic services, and that the regulatory demands in accommodating the provision of such services will not be undue. In light of the evolution of "middleman" services in other areas of commerce -- one with which there are now discernible parallels in the communications field -- it is important that the Commission approach the subject matter herein with an open mind. The history in other fields indicates that such services may serve distinctly useful public interest purposes. Should the Commission reach a similar conclusion in this proceeding, there is adequate experience in other regulated fields on the basis of which an appropriate regulatory framework for accommodating the communications "middleman" can be established.

Conclusion

59. The Commission -- indeed, the telecommunications industry -- is at a cross-roads. Both the pressures of technological advances in recent years, and user demands for specialized and diverse services, fully warrant the inquiry which the Commission has undertaken in this proceeding. In reexamining the range of services presently available to users, it must be recognized that existing communications usage has

been developed in reliance on present tariff allowances. Any policies which would serve to constrain present patterns of user communications should, therefore, be undertaken only on the most clear demonstration that such dislocations are required in the public interest.

60. Beyond recognizing the nature of present carrier tariff allowances, the Commission must first, CBEMA submits, review those tariff limitations which presently exist on individual and joint use of available carrier services. To meaningfully conduct such a review, the Commission should have before it a complete recitation by the carriers of their present tariff limitations, and a statement of the specific reasons for each. As noted earlier, if the carriers do not provide such information in their initial comments, the Commission should require that they do so prior to the time for responses or replies herein. For only in this way will the other parties be able to formulate and submit comments on current tariff provisions which are sufficiently particularized to be of assistance to the Commission in its policy formulations.

61. Insofar as current tariff offerings are concerned, the fundamental need is for the most efficient and flexible use of present carrier facilities consistent with needed preservation of network operational quality. And it may well be that both individual and joint users' ability better to satisfy their communications requirements through the elimination of present tariff

restrictions will significantly influence any determinations of need for certain types of communication services provided by "middlemen". It should be emphasized, however, that a need exists for an evaluation of such tariff limitations, quite irrespective of the ultimate course chosen with respect to resale of communications services.

62. Insofar as the "appropriate" role of communications "middlemen" is concerned, the initial task is defining, at least in general terms, what types of activities are meant to be described. To the extent that the ultimate objective is to determine what regulatory approaches should be formulated, the attributes of such activities must include at least those characteristics of communications which render the Commission's jurisdiction operative. In that regard, the Commission's Computer Inquiry established clear, well-founded distinctions between those activities warranting regulatory supervision, and those which do not. Data processing was a field over which the Commission determined not to assert jurisdiction. And it was further determined that the public interest required complete regulatory forebearance even where data processing offerings included a communications component directly related to the provision of the service involved. CBEMA does not view the Notice to reflect any intended review of the basic policies adopted in the Computer Inquiry -- policies which have permitted an expansion of needed

data processing services for the public. Rather, the issues herein which relate to the role of "middlemen" are directed instead to the provision, albeit in other than traditional fashion, of communication services which may warrant some degree of regulatory supervision.

63. If it is established that a real need exists for "middleman" communication services -- and in other fields such determinations have been made -- accommodation of such services will necessarily have to take into account potential effect on existing carriers and the regulatory consequences which will result. However, historical experience in other fields makes clear that necessary adjustments can be made without diminishing the advantages to the public such services may provide.

Respectfully submitted,

COMPUTER AND BUSINESS EQUIPMENT
MANUFACTURERS ASSOCIATION (CBEMA)

December 11, 1974

COMMENTS OF THE REMOTE PROCESSING SERVICES SECTION OF THE ASSOCIATION OF DATA PROCESSING SERVICE ORGANIZATIONS, INC.

The Remote Processing Services Section ("RPSS") of the Association of Data Processing Service Organizations, Inc. ("ADAPSO") by its counsel, hereby submits comments in the above captioned matter pursuant to the Commission's invitation appearing in its Notice of Inquiry and Proposed Rulemaking released on July 5, 1974.*/

Introduction

1. RPSS is comprised of ADAPSO members which offer remote access data processing services to the public. ADAPSO is a principal trade organization in the computer services industry. ADAPSO members include those companies which offer a variety of computer services to the public. RPSS includes

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*/ 47 FCC 2d 644 (1974). On August 2, 1974, the Acting Chief of the Common Carrier Bureau in response to a request by AT&T extended the time for filing initial comments from September 9th to November 11th. See FCC Release No. 27093 (Report No. 9746, Aug. 7, 1974). On October 30, 1974, an additional 30 day extension was granted. See FCC Release No. 32411 (Report No. 9994, Oct. 30, 1974).

member companies of ADAPSO that offer remote access data processing services whereby the customer, by way of telephone or telegraph lines, from his own or customer premises, can communicate with and use the computers of RPSS member companies. Since the use of telephone and telegraph lines is integral to the service offered by remote access data processing companies, RPSS is especially concerned with all matters which would affect either the quality, cost or availability of telephone or telegraph facilities. Accordingly, RPSS has on numerous occasions participated in proceedings before the Commission which affect computers and communications,[*/] and is thus vitally interested in the matters to be considered by the Commission in this Docket.

2. According to the Commission's Notice of Inquiry and Proposed Rulemaking, the purpose of this proceeding is to consider a series of basic questions which are pertinent to ascertaining:

> "[W]hether, and under what conditions, subscribers of the various service offerings of communications common carriers should be allowed to resell such services to others or to participate with others in the sharing

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[*/] For example, RPSS has participated in proceedings dealing with the interrelationship of computers and communications (Docket 16979) and the relationship of federal and state jurisdiction over the control of the interconnection of customer provided equipment to the facilities of communications common carriers (Docket 19808). In both matters, RPSS has intervened on the side of the Commission before the United States Courts of Appeal when review of the Commission's Orders was sought.

> or joint use of such services, and, if so, whether and to what extent the Commission should regulate any such resale or shared use."*/

The gravamen of this notice was that these matters were best considered on a broad basis with all of the facts, issues and permutations of offerings before the Commission. To this end the Commission has invited interested parties to respond to the twelve items of inquiry designated in the Commission's July 5th notice.

3. RPSS, in responding to the Commission's invitation, will limit its discussion to those matters which RPSS can appropriately comment upon at this time. This is a necessary limitation in view of the fact that many of the items of inquiry designated by the Commission direct the communications common carriers to present justifications for the restrictive provisions currently found in their tariffs or ask for factual information which is primarily or solely available from the carriers.**/ Since RPSS, as a matter of general principle, disagrees with existing resale and shared use restrictions and lacks access to much of the financial data of the carriers, RPSS believes it more appropriate to respond to those items in the context of reply comments. Accordingly, the initial comments of RPSS will consist of two parts: (I) a discussion of relevant developments affecting remote access data processing companies

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*/ 47 FCC 2d 644 (1974).

**/ See Designated Items of Inquiry Nos. 1, 2 (a,b), 3-5, 9.

as users of carrier provided services and the remote access data processing companies' customers who are served through a combination of data processing and communications facilities; and (II) the position of RPSS on those issues designated by the Commission to the extent they now can be appropriately addressed.

I. Remote Access Data Processors - Users of Carrier Provided Services

4. Remote access data processing companies through stimulating the development of new and better transmission and data processing techniques have simultaneously provided an impetus and market for further technological advances in data processing and related data communications equipment. As a result, these companies have been able to offer the public reliable remote access data processing services with sophisticated error detection and error correction features. Not only has the quality of such services been improved but costs accordingly have decreased. Thus, data processing and communications facilities have been more efficiently utilized through high speed transmission equipment and the development of multiplexing and concentrating techniques enabling more information to be transmitted in any given segment of a communications channel. Therefore, in view of present economic conditions and mindful of the fact that AT&T and all other carriers may be currently experiencing difficulty in keeping up with the demand for capital expenditures, it is obviously the wiser course for the Commission to encourage a more complete

utilization of existing communications resources through resale or shared use wherever otherwise appropriate.*/

5. The Commission's characterization of the data processing industry in its Tentative Decision in the Computer Inquiry**/ is just as accur[illegible]f not more so, today as when first stated in 1970. At [illegible]ime the Commission noted:

> "[W]e conclude that the offering of data processing services is essentially competitive and that, except to the limited extent hereinafter set forth, there is no public interest requirement for regulation by government of such activities. Thus, there is ample evidence that data processing services of all kinds are becoming available in larger volume and that there are no natural or economic barriers to free entry into the market for these services. The number of data processing bureaus, time sharing systems, and specialized information services is steadily increasing and there are no indications that any of these markets are threatened with monopolization.
>
> Competition among and between these entities is active and growing because of the varied service requirements of customer prospects. It is estimated that there are more than 800 service bureaus offering data processing services through some 2,000 branch offices. It is also estimated that service bureau annual sales to over 100,000 customers exceed $900 million and will climb to $1.2 billion by 1972. In addition, it is estimated that more than 5,000 data processing companies have sold excess computer time and capacity on their systems, and over 1,000 banks have offered data processing services to their customers, producing revenues ranging from $158 million to $315 million annually. For a relatively small capital investment, a service

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*/ See Designated Items of Inquiry Nos. 2, 8.

**/ 28 FCC 2d 291 (1970).

firm can be formed, computer equipment can be leased, and programmers can be hired. The factors which mark the difference between service bureau success or failure or [sic] imaginative innovation, quality programming, and useful service features, rather than the size of the staff or the computing installation. Growing in significance, also, are the specialized subscription services wherein service bureaus cater to the particular needs of various segments of the business world. For example, legal, medical, credit and stock quotation service offerings by data processing organizations are growing in number and complexity. The increasing popularity of time-sharing, wherein several remote users can gain concurrent access to the same central computer, offers a subscriber significant economies in light of the fact that he need not purchase or lease his own system. In 1967, time-sharing constituted a $50 million market, rose to $180 million in 1968, and is projected by some to rise to $900 million by 1972. The foregoing facts plus the existing and growing competition among service bureaus supports the conclusion that the offering of data processing services is open to companies of all sizes.

In view of all of the foregoing evidence of an effective competitive situation, we see no need to assert regulatory authority over data processing services whether or not such services employ communications facilities in order to link the terminals of the subscribers to centralized computers. We believe the market for these services will continue to burgeon and flourish best in the existing competitive environment.

We expect the competitive environment within which data processing services are now being offered to result in substantial public benefit by making available to the public, at reasonable charges, a wider range of existing and

> new data processing services. We believe that these expectations will continue to be realized in the free give-and-take of the market place without the need for, and possible burden of rules, regulations and licensing requirements."*/

6. The technological strides subsequently made by the remote access data processing industry continue to justify the Commission's determination to eschew innovation stifling rules in favor of a more flexible, permissive approach promotive of rapid technological development. The Commission is well aware of the adverse impact that rigid regulatory rules could have on the data processing industry. As the Commission observed in its 1971 Final Decision and Order in the Computer Inquiry:

> "We note that it has been argued that the Commission should elaborate upon the guidelines set forth in its Tentative Decision by giving examples and formulating specific factual situations under which particular hybrid services would fall into either the category of hybrid communications or hybrid data services. We believe, however, that in a field as dynamic and innovative as this one, it is not possible to formulate a sufficient number of hypothetical situations which would provide meaningful guidelines. We are also troubled

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*/ Id. at 297-98 (emphasis added). In its Final Decision and Order the Commission reaffirmed this position. See 28 FCC 2d 267, 270 (1971), reconsideration denied, 34 FCC 2d 557 (1972). The Second Circuit in reviewing the Commission's Computer Inquiry decision took note of the fact that "the computer industry is one characterized by 'open competition' and 'relatively free entry.'" GTE Service Corp. v. FCC, 474 F.2d 724, 735 (2d Cir. 1973).

> lest such formulation serve a purpose exactly contrary to that which is intended by inhibiting the ingenuity and responsiveness of the interested parties and causing them to limit or construct their services in accordance with the hypothetical cases we have listed rather than the actual needs of users. Instead, as we have previously indicated, we believe that guidelines for the industry and the formulation of general principles can best be accomplished by review and evaluation on an ad hoc basis of factual situations as they develop. Under such circumstances we will be reacting to demonstrated needs and will be developing precedents related to the 'real world' in the data/communications field."*/

7. Thus, by improving not only data processing equipment but the use of carrier provided transmission facilities as well, the remote access data processing companies have been able to offer the public a wide variety of efficient, economical data processing services. The fact that communications common carriers have just begun to offer techniques such as error correction which are widely employed in the data processing industry further attests to and illustrates the nature and extent of technological development and competitive impetus provided by the data processing industry.

8. The Commission's decision to structure a regulatory environment promotive of competition has as noted encouraged significant technological advances. During the early and mid-1960's when data transmission technology first

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*/ Regulatory and Policy Problems Presented by the Interdependence of Computers and Communications Services and Facilities, 28 FCC 2d 267, 278-79 (1971).

became a feasible method for sending information processed by high speed computers, there was a marked discrepancy between the ability of the computer to make use of communications circuitry for transmission purposes and the capability of the common carrier to furnish circuits and services of the sophistication necessary to fulfill the use requirements of remote access data processing companies. This gap was widened further by the introduction of timesharing. Because of the lack of a competitive environment in the common carrier field, AT&T demonstrated very little interest in developing sophisticated services to fulfill customer requirements. Lack of interest on the part of the carrier generated a demand for better technology. Improved technology was fostered and encouraged by sophisticated users such as remote data processing companies which sparked advances while providing a ready market for innovations. As a result, more advanced modem equipment*/ was developed capable of operating at speeds of 4800, 7200 and 9600 bits per second as opposed to the original carrier provided equipment which operated at up to a speed of only 1200 bits per second. At present there are some 48 modem manufacturers marketing 225 different devices of this type.

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*/ Modems are devices which accept a signal (digital) from a computer or terminal and transform it into a suitable form (analog) for transmission over a communication facility, and vice versa.

9. Interest in sending more information over carrier provided communication channels led to the development of multiplexers. These devices in one of several manners concentrate individual low speed low volume data transmissions into a higher density high speed data stream which is still within the capacity of circuit channel bandwidths or time frames. As a result, transmission capacity which was previously wasted is now used. Currently, 28 companies are producing 49 types of multiplexing units.

10. Further development sponsored and encouraged by the remote access data processing industry has continued this trend toward more efficient communications utilization. Time sharing networks now utilize highly sophisticated concentration techniques through the use of mini-computers[*/] and advanced routing techniques employing large computers. The result is that hundreds of terminals can now operate over networks composed of voice grade lines with the benefit of automatic re-transmission, error correction and alternate routing. Independently produced data processing equipment has thus promoted better, more sophisticated and reliable communications at a much more economical cost than anything available from the carriers.

11. As a result of these technological advances and the competitive pressures which accompanied them, AT&T was obliged to respond by providing additional services at reduced prices. For example, in the low speed modem area, AT&T, in response to competition, developed the 103E series

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[*/] Currently 54 manufacturers are producing 167 types of mini-computers.

that compacts multiple 103 data sets into less space and offered this device at a much lower cost than anything previously available from AT&T. Next AT&T introduced the 113 data set which occupied still less space and offered it at still a lower price.

12. Competition has facilitated the rapid technological and economic advancements which characterize the data processing industry. Indeed these advances have prompted and encouraged improvement in communications services. Emerging competition in the communications industry has further reinforced these benefits. Thus, it is reasonably to be expected that liberal resale and shared use rules would afford the user more alternatives from which to select and should lead to further improvements in the cost and quality of the end products (or services) used by the consumer.*/

II. The RPSS Position on the Issues

A. Generally

13. RPSS submits that all the available evidence indicates that as to data transmission there is ample justification for liberal rules authorizing resale, sharing

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*/ See Designated Item of Inquiry No. 2(c).

authorized use or use for itself.*/ Liberal rules on such use ought to apply to the facilities of all communications common carriers.**/ Indeed, the Commission has already recognized in authorizing specialized common carriers***/ and value added carriers****/ that, with respect to data transmission, competition is advantageous to the public and the industries involved. In commenting on this the FCC Staff analysis of specialized common carrier services stated:

> "The demand for all types of communications service is growing very rapidly. The use of standard voice communications services is expanding at very high rates

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*/ For example, there appears to be no basis for prohibiting hybrid data processing companies from using carrier facilities in offering their services. However, under the current provisions of § 2.2.1(J) of AT&T Tariff FCC No. 260 and similar provisions of the WATS tariff as construed by AT&T, a "value added" carrier can offer AT&T facilities to a hybrid data processing company, but AT&T will not directly provide service to the hybrid data processing company. AT&T's position is contrary to the Commission's ruling in Docket 16979 that service may not be refused to hybrid data processing companies. *See* 28 FCC 2d 267, 279-80 (1971). Although AT&T has never provided an explanation or justification for its refusal to provide service directly to hybrid data processing companies, AT&T has indicated that this issue is to be considered in this Docket. *See* AT&T Reply, Transmittal No. 12171 at 10-13 (Oct. 25, 1974). RPSS will reply to any justification which AT&T may offer.

**/ *See* Designated Items of Inquiry Nos. 2, 8.

***/ *See* In the Matter of Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services, 29 FCC 2d 870, *reconsideration denied* 31 FCC 2d 1106 (1971).

****/ See Telenet Communications Corp., 46 FCC 2d 680 (1974); *Graphnet Systems, Inc.*, 44 FCC 2d 800 (1974); Packet Communications, Inc., 43 FCC 2d 922 (1973).

> and it is expected that this rapid growth will continue, if not increase. In addition, data communication, which has been in an embryonic stage of development, will probably exhibit very substantial growth over the next decade. In proposing a policy favoring the entry of new specialized common carriers, we look toward a degree of competition oriented toward the development of new communications services and markets and the application of improvements in technology to changing and diverse demands . . . .
>
> In an industry of the size and growing complexity of the communications common carrier industry, the entry of new carriers could provide a useful regulatory tool which would assist in achieving the statutory objective of adequate and efficient services at reasonable charges. Competition could afford some standard for comparing the performance of one carrier with another. Moreover, competitive pressure may encourage beneficial changes in AT&T's services and charges in the specialized field, and stimulate counter innovation or the more rapid introduction of new technology. The Commission noted in its MCI decision the apparent response of AT&T to MCI's proposal in modifying certain to its sharing provisions of its private line tariff offerings."*/

The Commission upon reviewing the record in that proceeding found:

> "ample support for the Staff's conclusions as to the trend of the communications industry generally, the nature of the potential market, and the public need and demand for the proposed services."**/

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*/ 24 FCC 2d 218, 330, 333 (1970).

**/ 29 FCC 2d 870, 904 (1971).

14. Further, in certificating value-added carriers the Commission recognized that these entites will:

> "introduce new and improved means by which users having data transmission requirements may satisfy those requirements in a manner not now available . . . . It is apparent that there is a growing market to be serviced by such operations and that existing common carrier services are not now available to satisfy the demands of that market."*/

15. Thus, the Commission has recognized the benefits that competition brings to users of data communications services. The competitive nature of the data processing industry has in fact stimulated improved remote access data processing services. Accordingly, there is every reason to believe that significant additional advantages will accrue to the public from the removal of resale and sharing prohibitions. These benefits include resultant savings in communications costs, possible reductions in managerial and administrative burdens, the attainment of more reliable communications and the promotion of the development of more sophisticated techniques.**/ Recent technological advances including split stream modems, line routing mini-computers, and multiplexers (concentrators) capable of subdividing and packing circuits full, have made the prospect of sharing much more attractive.***/ The ability to share private line facilities would encourage businesses to come together and obtain services at rates which they could afford. Without sharing, this opportunity is precluded so that at present only relatively large users benefit from existing sharing provisions. Obviously, the

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*/ Packet Communications, Inc., 43 FCC 2d 922, 925 (1973).

**/ *See* Designated Items of Inquiry Nos. 2, 8.

***/ *See* Designated Item of Inquiry No. 7.

lower cost benefits of sharing should also be extended to smaller business groups which could band together to take advantage of any extension in the availability of line sharing which might result.

B. Private Line Sharing Versus Resale

16. There traditionally has been a distinction between the resale of communications services and the sharing of private line communications facilities. This distinction continues to be meaningful in the context of data transmission. Thus, where each party to a sharing arrangement has a significant stake in transmission quality by virtue of having its own traffic involved and the economic situation is such that there are numerous viable competitive opportunities so that sharing arrangements cannot be the basis for the exercise of significant economic power, the statutory rule of non-regulation (or viewed differently, the Commission's election of regulatory abstinence) continues to be the best policy choice.*/

C. Regulatory Pattern

17. The Commission's *Computer Inquiry* decision**/ as embodied in Subpart G of Part 64 of the Commission's Rules denotes a line of demarcation between regulatable and non-regulatable entities. These rules as administered by the

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*/ *See* Designated Item of Inquiry No. 11.

**/ 28 FCC 2d 267 (1971), *reconsideration denied*, 34 FCC 2d 557 (1972).

Commission have proven to be beneficial to the public with no adverse effects on the public having been noted or apparent.[*]

III. Conclusion

18. As noted earlier, RPSS expects to comment further in this proceeding as factual data from the carriers and the bases, if any, for restrictions on use are made a matter of record.

Respectfully submitted,

Remote Processing Services
Section of ADAPSO, Inc.

Dated: December 11, 1974

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[*] *See* Designated Item of Inquiry No. 12.

[There are no pages Nos. 623,
624,
625 or
626]

DOW JONES & COMPANY, INC. - COMMENTS

Dow Jones & Company, Inc. ("Dow Jones"), by its attorneys, Patterson, Belknap & Webb, pursuant to paragraph 39 of the Commission's Notice of Inquiry and Proposed Rule Making ("Notice"), 39 F.R. 25351 (July 10, 1974) as amended 39 F.R. 29008 (Aug. 13, 1974) and 39 F.R. 39049 (Nov. 5, 1974), hereby submits its comments on the issues raised in the Notice regarding nonprofit line-sharing, particularly regarding Dow Jones' current nonprofit joint use of an AT&T Series 3000 private line communications channel (FD 11959).

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APPENDIX

Letter from J. J. Kenny Co., Inc. (i)

Letter from Knight News Wire (ii)

Letter from National Catholic News Service (iv)

I

INTRODUCTION: ISSUES TREATED HEREIN

1. In paragraph 31 of the Notice, the Commission requested interested persons to address a number of issues in docket 20097. After consideration Dow Jones has determined that it has sufficient information and experience at this time to respond only to the following issues:

> 2. Would the public interest be served by a removal of all restrictions on resale of private line services? What would the effect thereof be on:
>
> * * *
>
> c. Communications users: Discuss possible new services, new pricing structures, effect on cost of existing services, better communications management and stimulation of the use of the most efficient type of carrier for each type of service.
>
> * * *
>
> 5. What is the justification for limiting the sharing of private line services to, generally, voice grade and under services and for requiring those desiring to effectuate a sharing arrangement to have a communications need of their own?
>
> * * *
>
> 6. Would the public interest be better served by removing all restrictions on the sharing of private line facilities? If that would not be desirable, recommend necessary or desirable restrictions and justify any recommendations taking into consideration the effect of each on the carriers, other elements of the communications industry and the using public.

7. What is the public need for sharing of private line facilities? Discuss any new technologies being developed which would make sharing more attractive, new user applications of sharing and the relationship between the need for sharing and the availability of facilities for resale. Specifically, what need for sharing would remain if all restrictions on the resale of private line facilities were eliminated?

* * *

11. Should the Commission regulate the sharing agreement made between customers and joint users and, if so, to what extent and in what manner? What reports should be required? Specifically consider possible guidelines governing the manner in which the cost of effectuating the sharing arrangement should be shared so that there is a clear distinction between sharing and resale?

II

DOW JONES, A NEWS WIRE JOINT USER

2. Dow Jones engages in the business of gathering, preparing and disseminating news, statistical information and intelligence. It publishes the Dow Jones News Service (the "News Service"), the Dow Jones International News Wire, the Dow Jones International Banking Wire, the Dow Jones International Energy Wire (collectively, the "news services") and, through a subsidiary, the Canadian Dow Jones News Service. In addition it publishes The Wall Street Journal, The National Observer, Barron's National Business and Financial Weekly and, through a wholly-owned subsidiary, Ottaway Newspapers, Inc., twelve daily and five Sunday local newspapers variously located in New York State, Pennsylvania, Connecticut, Massachusetts, Michigan and Oregon. Also, Dow Jones and the Associated Press ("AP") jointly produce the AP-Dow Jones Economic Report, a daily international wire service specializing in distributing economic news outside the United States and Canada.

3. The Dow Jones news services provide simultaneous transmission of news over a single nationwide voice grade Series 3000 Type 3002 private line communications

channel (FD 11959) directly to each subscriber in every major United States city and many smaller cities and towns. Dow Jones currently uses this line jointly with six other independent organizations. To serve subscribers, Dow Jones receives at its main editorial office in New York City news from its staff of reporters and writers in 21 bureaus located in major cities in the United States, Canada, Western Europe and Asia. News also comes to its central office from part-time correspondents, press news services including AP and United Press International ("UPI") and various stock and commodity quotation ticker services.

4. The news transmitted by the news services is basically corporate, financial and economic information which may be of direct interest to subscribers or their customers. In addition to a broad range of business and financial news, the news services carry representative stock quotations and averages at intervals to show the trend of the stock market, comments on the market and its movement, and information on news events behind such movement.

5. Like a newspaper and unlike most press news services, the Dow Jones news services disseminate news directly to at least 97% of their readership. The services are generally available at the prescribed rates to

anyone and are transmitted directly from a central point in New York City to the subscribing financial institutions, brokerage and investment houses, banks, corporate and business offices, hotels, clubs and newspapers located in appproximately 700 cities and towns throughout the United States.

6. Members of the securities industry comprise the Dow Jones news services' primary customer group. As of February 1, 1974, securities firms provided approximately 77% of the total revenue to the combined news services and accounted for approximately 78% of the News Service printers in operation.

7. The news services are displayed on teleprinters, sometimes referred to as "tickers," on each subscriber's premises. The sole function of the printer is to enable the subscribing public to receive and read the news services. Dow Jones owns and operates the following conversion devices principally for its securities firm subscribers that do not require on-premises printers: (i) NEWSBOARD, a large electronic panel display for audience viewing, and (ii) DOWVUE, a cathode ray tube system for small-scale display. Additionally, Dow Jones provides station terminals not equipped by Dow Jones to third-party equipment vendors who display the News Service on their own equipment to certain members of the securities industry.

III

DOW JONES' JOINT USE PRACTICES

A. Description of Telecommunications Services Used Jointly

8. Until June 13, 1974, the effective date of the Hi-Lo tariff, the Dow Jones news services transmitted all news from New York City to subscribers in the United States over FD 11959. the Series 3000 private line communications channel leased from AT&T. This circuit was used jointly with five independent organizations: J.J. Kenny, Inc.; Shearson, Hayden Stone, Inc.; National Catholic News Service; Paine, Webber, Jackson & Curtis Incorporated; and Knight Newspapers, Inc. In addition, Ottaway News Services, a service of Ottaway Newspapers, Inc., a wholly owned subsidiary of Dow Jones, also used the line. On June 13, 1974, Dow Jones took advantage of the Telpak end-link arrangement to reduce costs associated with Hi-Lo. Until August 19, 1974 the Dow Jones news services' transmissions were carried on FD 11959 in a Series 5000 Telpak, while the Ottaway News Service transmissions and all the transmissions of the five line-sharers were carried under the Hi-Lo tariff on an additional voice grade nationwide circuit (FD 22667) leased by Dow Jones. Since August 19, 1974, all transmissions have been carried on the single

original voice grade circuit (FD 11959) under line-sharing with a Series 5000 Telpak end-link. As of November 1, 1974, Television News, Inc., has joined the group, bringing the total of line-sharers to six, apart from Dow Jones and its subsidiary, Ottaway. Collectively Dow Jones, Ottaway and the other six are hereinafter referred to as the "joint users"; the six alone are called the "line-sharers."

9. This circuit (FD 11959) is a broadcast multipoint channel transmitting on a one-way simplex basis, covering approximately 23,000 IXC circuit miles of voice grade data channels and having many exchanges and customer locations. The circuit is operated on a full-time basis, 24 hours a day, seven days a week. It has eighteen channels, each with a capacity of 75 Baud. Dow Jones now uses the equivalent of eight channels itself, leaving ten channels available for line-sharing, of which only seven are now shared. Knight Newspapers uses the equivalent of two channels; all other sharers use only one each.

10. Dow Jones also leases from AT&T Series 3000 FDA (alternate voice data) circuits for a store and forward communication system which, by computerized switching, transmits internal messages for gathering news and for advertising, production and circulation operations of The Wall Street Journal. In addition, Dow Jones leases other voice grade circuits primarily for tie line and foreign exchange services. None of these circuits is shared.

B. History of Dow Jones' Joint Use

11. Following the Commission's June 1971 disallowance of the Press Association Rates applicable to teletype grade facilities, the Dow Jones news services transferred from teletype to voice grade facilities. Dow Jones made the change principally to offset the adverse impact of the Press Rates Case by taking advantage of tariff revisions permitting the derivation of telegraph grade subchannels from voice grade channels and the joint use of voice grade circuits.

12. In January 1972, the Dow Jones Communications Department made a survey of several leading brokerage houses, all of which were customers of the news services, to discover whether any had need for and were interested in the possibility of sharing a voice grade private line. No proposals or offers were made at this time; approximately half the brokerage houses surveyed indicated some need and some interest. The results were sufficiently encouraging to support a decision to undertake a technical facility study in March, 1972.

13. J. J. Kenny came on line as a sharer on September 25, 1972. Kenny, a customer of the news services, learned of the opportunity to share the line through contact with the news services sales department. Walston & Co. came on line on November 1, 1972 and went off line on December 31, 1973, because the firm went out of business. Shearson, Hammill (now Shearson, Hayden Stone) became a joint user on January 1,

1973; Paine, Webber, Jackson & Curtis came on line on February 5 of that year. The three brokerage firms all became aware of the possibility of line-sharing with Dow Jones through the original January 1972 survey. In contrast, National Catholic News Service, which went on line on May 21, 1973, learned of the possibility of line-sharing with Dow Jones from a communications consultant it retained. Knight Newspapers, which went on line July 1, 1973, discovered the possibility of line-sharing in the course of discussions between Knight and Dow Jones. The most recent line-sharer to join, Television News, Inc., on November 1, 1974, came to Dow Jones on a referral from UPI.

14. Dow Jones has from the beginning accepted line-sharers on a non-discriminatory, first-come, first-served basis. The only criteria have been a communications need which can be met by the existing circuit system and the availability within the circuit of sufficient channels to meet that need. To date all the available channels have not been used, so that more line-sharers can be accomodated. Since the inception of the line-sharing arrangement the terms of the line-sharing contract have not materially changed except for the addition of the 10% administrative fee to be paid by the line-sharers to Dow Jones. (See paragraphs 20, 21 & 22, below.)

15. The line-sharers joined with Dow Jones for two reasons: (1) to gain access to a highly reliable nationwide communications system otherwise inaccessible to them; and (2) to reduce communications services expenditures, either actually made or projected to be made. For example, before joining in the line-sharing arrangement National Catholic News Service could not afford to lease any communications wire services. And with line-sharing J.J. Kenny Co. has been able to add nearly eighty customers to its communications network that could not have been economically served before. (See letters in Appendix.) Dow Jones joined with the line-sharers to reduce its necessary communications costs. Unlike the line-sharers, under the circumstances existing after the Press Rates decision Dow Jones would have leased a voice grade private line even if line-sharing had not been a possibility. Without line-sharing Dow Jones would simply have had to bear the full cost of the excess capacity in the circuit.

C. Current Practice

16. Dow Jones leases the private voice grade circuit (FD 11959) from AT&T. Each of the line-sharers has agreed with Dow Jones to pay AT&T directly each month for each 75 Baud channel used. AT&T deducts a sum per channel from the charge that would otherwise be made to

Dow Jones and bills the line-sharers individually. However, Dow Jones is responsible to AT&T for the total cost of the circuit; if any of the line-sharers defaults, Dow Jones as guarantor must pay the sum.

17. Dow Jones now pays about 3/4 of the actual monthly IXC channel charge. Dow Jones bears about 1/3 of the proportional cost of the individual channels used by the line-sharers in addition to paying the full cost of the channels it uses itself. Dow Jones makes absolutely no profit on the monthly channel charge paid to AT&T. The only effect is to relieve Dow Jones of part of the expense for the circuit's otherwise unused capacity.

18. In addition to the monthly channel charge, each line-sharer pays to AT&T a monthly "joint user" fee and a monthly service terminal fee, for each terminal.

19. The line-sharers pay Dow Jones a monthly rental for each modulator-demodulator terminal. This fee covers Dow Jones' cost of original investment and periodic maintenance.

20. Since June 13, 1974, the line-sharers have paid Dow Jones an administrative fee of 10% of the total of the AT&T monthly channel charge, joint use fee and service terminal fee plus the Dow Jones equipment rental fee.

21. The 10% fee was established by Dow Jones in consultation with the line-sharers, all of whom agreed this amount would be reasonable. A percentage rate was chosen because no precise value can be readily determined for the

varying amounts of administrative services provided to a single line-sharer each month. The percentage fee has a reasonable basis in that the amount varies directly with the number of service terminals and channels the line-sharer uses. The overall administrative cost to Dow Jones in a given month can not be readily determined. The total amount paid to Dow Jones by all line-sharers in the form of this 10% administrative fee covers less than the full cost to Dow Jones of administrative services performed.

22. The administrative fee reimburses Dow Jones for its expenditures in providing the following services: system design; order placement and follow up with AT&T for new circuits and equipment; billing costs, including dealing with AT&T on behalf of the line-sharers; and maintaining regular contact with the line-sharers. Prior to June 13, 1974 Dow Jones bore the cost of these services alone. This fee results in no profit of any kind for Dow Jones; it merely helps Dow Jones to realize the basic cost saving in line-sharing by passing along to the line-sharers some but not all of the legitimate administrative expenses of the joint use agreement. For each line-sharer this administrative fee is less per channel than that portion of the cost of each channel (about 1/3) which Dow Jones now carries (see paragraph 17 _supra_). Thus each line-sharer now receives each channel and Dow Jones' administrative services

for less than the proportional cost of the channel alone. Clearly Dow Jones administers the line-sharing arrangement on a cost-sharing nonprofit basis.

IV

LINE-SHARING AND RESALE OF LINES

A. Removing Restrictions on Resale

23. As the above discussion of the history and current practice of Dow Jones' line-sharing arrangements demonstrates, Dow Jones does not re-sell lines but only shares its one voice grade circuit (FD 11959) on a cost-sharing nonprofit basis. Dow Jones has no current or foreseeable interest in reselling lines for profit. Dow Jones only wishes to continue its current line-sharing arrangements in order to reduce the cost of leasing the voice grade channel circuit.

B. Removing Restrictions on Sharing

24. Although Dow Jones has no current need to share higher than voice grade services, Dow Jones generally does not believe that line-sharing should be limited, as at present, to series 3000 (voice grade) and under services. Line-sharing is a useful adjunct to the provision of services for profit which should be made more widely available, as long as the communications need requirement is retained.

C. The Communications Need Requirement

25. Dow Jones believes that the current requirement of AT&T's Tariff 260 that all joint users have communications needs of their own should be continued. Indeed, a communications need is a necessary prerequisite, although not the only one, for the existence of true nonprofit line-sharing.

D. The Availability of Sharing if Resale is Unrestricted

26. Even if all restrictions on resale of private line facilities were eliminated, line-sharing should continue to be available. Dow Jones doubts that line-resale organizations would offer services comparable to those now available under the line-sharing agreement to Dow Jones and its fellow joint users, at a comparable price.

27. Regardless of the availability of these particular services through middlemen, line-sharing should remain an option for users of voice grade, or any, private line services, because it adds a needed measure of economic flexibility to the nation's wire communications resources. Within limits line-sharing offers an important opportunity for users and potential users, whatever their resources and whatever the market conditions, to tailor wire communications to their own needs. In this respect,

line-sharing helps insure that the nation's wire communications system remains a public resource rather than the private domain of a few vendors.

28. Furthermore, line-sharing permits a more efficient distribution of messages among communications systems resources, by eliminating duplication. Line-sharing allows excess capacity leased by one party to be filled by joint users. If line-sharing is disallowed and, as Dow Jones believes, middlemen prove unable to offer sufficiently diversified substitute service for profit, the nation's whole wire communications system could come under strain. Certain circuits might be crowded while others might be relatively unused.

E. The Effect of Eliminating Line-Sharing

29. Eliminating line-sharing would not by itself determine for Dow Jones whether it would continue to lease a voice grade line for its own use. However, Dow Jones expects that if line-sharing is eliminated its fellow joint users would be very seriously affected. The line-sharers would either have to purchase other more expensive services, or cut back severely or cease communicating by nationwide wire services altogether. For example, Knight Newspapers' costs would increase about 91%

if it had to lease a series 1006 circuit for teletype. J.J. Kenny's costs would increase about 130% if it returned to an independent teletype grade circuit. National Catholic News Service would be forced to give up wire services altogether and use the mails to distribute its information. (See letters in Appendix.) All the joint users strongly oppose eliminating line-sharing of voice grade circuits.

V.

REGULATION OF LINE-SHARING AGREEMENTS

30. Dow Jones opposes regulation of line-sharing agreements. The benefits, if any, of such regulation are outweighed by the costs to the joint users. The purpose of line-sharing is to increase communications users' access to communications resources and to save money for them. Regulation will only complicate the creation and administration of line-sharing arrangements and expend resources unproductively. The increased costs could even drive some present or potential line-sharers away from line-sharing.

31. The model regulations proposed in Notice paragraph 21 lack detail; their effect on Dow Jones' current line-sharing practices cannot be readily determined. The model states a very general standard of conduct, that line-sharing be carried out "only on a cost-sharing non-profit basis, prorated equitably." No enforcement mechanism is defined, apart from a requirement of notice at the initiation or termination of a line-sharing agreement and an annual reporting requirement. The proposed rules do not indicate the degree of detail expected, for example, in the financial statement required in the annual report.

32. The chief benefit of such requirements is disclosure of information to line-sharers, to AT&T and to the Commission. However, Dow Jones' fellow joint users and AT&T have been and are regularly kept informed concerning the line-sharing arrangements. For example, the line-sharers and AT&T have long known all the terms of the contract, the rates charged by AT&T and the fees charged by Dow Jones. The line-sharers know well what services Dow Jones performs for them. They know that costs per channel and services are the same for each. Dow Jones keeps the line-sharers informed about technical problems in the circuit and regularly notifies them of the availability of cities added to or deleted from the network. Dow Jones has been prepared at any time to disclose this information to the Commission and has done so, willingly, in these comments. Dow Jones expects in the future to continue to keep the line-sharers well informed, for the line-sharers and Dow Jones necessarily have close relations: what affects the communications line affects them all. Dow Jones also expects to keep AT&T informed. Further, Dow Jones expects to continue to be willing to inform the Commission concerning its joint use practices.

33. In these circumstances an annual reporting requirement lacks utility. The line-sharers already are fully informed. A reporting requirement will only create an administrative burden by complicating the joint use arrangement, regardless of its added cost in money.

34. The increase in costs can only be guessed. Assuming that only Dow Jones will be required to keep records and file annual reports, Dow Jones can make a rough preliminary estimate that annual costs to individual joint users could rise by $2000 or more. If the line-sharers had to keep records and file reports themselves, or if legal fees became necessary, costs would rise accordingly.

35. An administrative burden and an increase of costs of the magnitude indicated may not cause Dow Jones or most of the line-sharers to stop sharing the line. For Dow Jones and most of the line-sharers such costs and administrative requirements cause concern because they produce nothing new or useful. Such administrative complexity and increase of expenses run counter to the whole spirit of line-sharing. They also raise the prospect that the burdens of regulation will grow, and as they grow, their impact becomes more significant. At some now undefined point the savings for Dow Jones will not justify continuing the line-sharing arrangement. Even before the impact of regulation becomes too great for Dow Jones, the burden of regulation could force some of Dow Jones' fellow joint users to discontinue line-sharing.

36. An increase in costs even at the level projected above could possibly halt the participation of National Catholic News Service in the line-sharing arrangement.

National Catholic News Service's annual surplus, only $10,000 last year, could not readily absorb an additional $2,000 or more in costs for regulation, particularly when current necessary operating costs are rising. As National Catholic News Service cannot afford alternative wire services, the regulation of line-sharing agreements could have devastating impact on its operations. (See letter in Appendix.) Other nonprofit organizations participating in other line-sharing arrangements may well be similarly affected.

37. The burdens of regulation outweigh the benefits for these joint users. An unnecessary procedure ought not to be introduced.

VI.

CONCLUSION

38. Dow Jones agrees with the Commission ". . . that sharing arrangements . . . result in greater access to and fuller utilization of our nation's communications capacity and . . . their continuation is warranted." Notice paragraph 19. The current tariff is reasonable and in the public interest in this respect. The tariff allows nonprofit organizations, such as National Catholic News Service, or small enterprises, such as Television News, to obtain access to nationwide communications services at a price otherwise unattainable. Line-sharing introduces valuable economic flexibility into our national communications system.

39. Furthermore, Dow Jones' line-sharing arrangement does, as the facts demonstrate, operate on a cost-sharing nonprofit basis. The existing arrangement is simple, fair, efficient and economical for all participants. It does not need to be made less efficient, less economical and complicated in the pursuit of a greater fairness which cannot, in fact, be attained. The Commission regulates line-sharing sufficiently through

Tariff 260. Line-sharing as carried out by Dow Jones and its fellow joint users needs no further regulation.

Respectfully submitted,

PATTERSON, BELKNAP & WEBB
Attorneys for Dow Jones &
Company, Inc.

New York, New York

December 9, 1974

APPENDIX

J. J. KENNY CO., INC.
55 BROAD STREET
NEW YORK, N.Y. 10004

RICHARD E. DONNELLY
[illegible]

(212) 952 4592

December 5, 1974

Robert S. Potter, Esq.
Patterson, Belknap & Webb
30 Rockefeller Plaza
New York, New York 10020

Dear Mr. Potter:

We are a municipal bond brokerage firm - sometimes called a "broker's broker" - performing liquidity functions within the secondary market. Integral with a full range of services to our nationwide clients is our private teletype network going to 378 municipal bond trading departments of dealers and dealer-banks in 64 cities. This represents 270 customers in 63 cities outside New York City. Prior to our conversion to line-sharing arrangement with Dow Jones in late 1972, we had an AT&T circuit which allowed us economically to reach only a total of 300 customers - 170 customers in 40 cities outside New York City. After becoming a joint-user we have added 78 customers and 23 cities thereby broadening the marketability of municipal bonds.

In the event that line-sharing is no longer allowed, we would incur the substantial increased cost of again leasing a teletype grade circuit from AT&T. The estimated costs furnished us by AT&T indicate a monthly increase of approximately 130% exclusive of again paying for installation of teleprinters! The result of this would be the termination of no longer economical service to members of the municipal bond industry and, therefore, the institutions are individuals they service in various regions of the country.

If the line-sharing agreement with Dow Jones becomes subject to regulation by the Federal Communications Commission, we cannot predict the result with certainty. Our current estimates of the increase in our administrative overhead and in our share of Dow Jones' increased costs indicate that we could continue to share the line in spite of the greater expense. We do not want to use such additional resources for non-productive purposes. We are against increased bureaucracy, and we are quite happy and satisfied with Dow Jones' administration of the line-sharing agreement. Dow Jones has been both efficient and effective.

Very truly yours,

Richard E. Donnelly

RED:ac

KNIGHT NEWS WIRE 654

Knight Newspapers • New York Daily News • Chicago Tribune
Dean H. Schoelkopf • *Editor*
321 West Lafayette Boulevard, Detroit, Michigan 48231 • (313) 222-5174

November 30, 1974

Robert S. Potter, Esq.
Patterson, Belknap & Webb
30 Rockefeller Plaza
New York, New York 10020

Dear Mr. Potter:

Knight-Ridder Newspapers, Inc. wishes to inform Dow Jones & Company, Inc. of the effect on it of elminating line-sharing or of regulating the current line-sharing agreement between Dow Jones and Knight-Ridder.

Knight-Ridder publishes 35 daily newspapers. Its subsidiary, Knight News Wire, operated in partnership with The Chicago Tribune and The New York Daily News, transmits news data to the partner newspapers and to outside subscribers as well. Prior to its line-sharing arrangement with Dow Jones, Knight was party to a line-sharing agreement with The Chicago Tribune and The New York Daily News for mutual exchange of news data but found it not economically feasible to sell to outside subscribers. Upon entering the line-sharing agreement with Dow Jones on July 1, 1973, the Knight News Wire became able to expand its service to outside subscribers and substantially to reduce its communications costs.

Eliminating line-sharing would require the Knight News Wire to lease from AT&T for independent teletype service a series 1006 circuit at a cost increase of approximately 91% over the costs of its current system. An increase of this size would be severely damaging to the Knight News Wire. As a relatively new enterprise it would find it most difficult to absorb the sharply increased costs associated with independent line leasing and at the same time fears the effect of an attempt by it to pass on these increased costs to recession-conscious publishers.

SALES: CHICAGO TRIBUNE -- NEW YORK NEWS SYNDICATE (212) 682-1234
220 E. 42nd STREET, NEW YORK, N.Y. 10017

Current information suggests that Knight probably could continue to share the line with Dow Jones if the existing line-sharing agreement becomes subject to regulation. However, we see nothing to gain from such regulation. Dow Jones has disclosed to Knight-Ridder all relevant information regarding the line-sharing agreement. Dow Jones treats Knight fairly and has been a good administrator of the agreement. Knight-Ridder opposes spending money on useless regulation.

Very truly yours,

Dean Schoelkopf

Dean Schoelkopf

DS/kh

NATIONAL CATHOLIC NEWS SERVICE 1312 MASSACHUSETTS AVE., N.W. WASHINGTON, D.C. • 20005 • (202) 659 6722

A. E. P. WALL
DIRECTOR and EDITOR-IN-CHIEF

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December 2, 1974

Robert S. Potter, Esq.
Patterson, Belknap & Webb
30 Rockefeller Plaza
New York, New York 10020

Dear Mr. Potter:

I have watched with interest the Federal Communications Commission's growing concern with line resale and line-sharing. I felt it important to write to your firm, as the attorneys representing Dow Jones and Company, regarding National Catholic News Service's line-sharing agreement with Dow Jones.

Let me begin by explaining the function of the National Catholic News Service. We perform for Catholic newspapers and periodicals the same service that Dow Jones performs for the financial community, that United Press International and Associated Press provide for the daily press, and that Commodity News Service provides for the commodity market. We have for 52 years been the largest gatherer and distributor internationally of news of a Catholic nature. We are a division of the United States Catholic Conference, which is the civil corporation through which bishops of the United States Roman Catholic Church provide support on a national and international basis for their local diocesan programs in areas that span the gap from family services, education and news to immigration. As a division, our funds, which come from Catholic periodicals and newspapers and not the bishops themselves, are very limited. For 51 years, our service was distributed by mail. It was the only service we could afford. Mail service has continued to deteriorate. We have long been aware of the tremendous potential of leased wire, but the cost and our limited funds had kept us away from such a timely, modern method of news and information delivery.

Thus, when we learned that the Federal Communications Commission had permitted joint use of wire transmission systems under Tariff 260 we were elated. At last this modern, invaluable method of transmission would be economically feasible. To give you an idea of the impact of line-sharing, if we leased a type 1005 teletype grade circuit our costs would be about 210% higher than they are under line-sharing. Such a saving brought the teletype system within our economic grasp. We could not have done it otherwise. If the Federal Communications Commission now outlaws line-sharing, we will be forced to return to our former distribution method, the U.S. Mail.

Regulation of the line-sharing agreement also could make it impossible for us to continue to use a wire transmission system. Our surplus last year on $900,000 income was less than $10,000. The estimated additional administrative cost, $2,000 or more, could conceivably put us into the red, especially at a time when inflation is rapidly increasing our current necessary costs. If that proved to be true, we could not continue line-sharing. Nor would we gain anything from such regulation. Dow Jones is cooperative and helpful and keeps us fully informed. All of us line-sharers are dealt with equally by Dow Jones.

Somehow, I believe that it was the intention of the Federal Communications Commission that line-sharing would open up tremendous new possibilities for the distribution and dissemination of information. As always, the Commission, I am sure, was interested in how the public interest could best be served. I have shown you that the joint user provision made modern, fast and instantaneous delivery of news possible for the first time for the National Catholic News Service. I hope that I have adequately demonstrated also that regulation of the line-sharing agreement could possibly end our participation as effectively as an outright ban on line-sharing. Such regulation could wipe out a tremendous tool for small limited-income users such as ourselves.

Herein lies the reason for my writing you today. I cannot believe that the Federal Communications Commission would wipe away the tremendous good being done either by eliminating line-sharing or by making it difficult or impossible to continue.

Although we are not directly involved as a prime lessee under Tariff 260, I did feel that it was important for your firm as the representative of Dow Jones, and for the Federal Communications Commission, to understand all of the implications for the little guy.

Cordially

Richard A. Banules

Richard A. Banules
Manager
Business and Field Services

Copy: A. E. P. Wall
Director and Editor-in-Chief
NC News Service

SECRETARY

COMMENTS OF DATA TRANSMISSION COMPANY

Data Transmission Company (DATRAN), by its attorneys, hereby offers its comments respecting the matters under investigation in the aforecaptioned proceeding.

The Nature of This Proceeding

1. On June 26, 1974, the Federal Communications Commission (Commission) adopted a "Notice of Inquiry and Proposed Rule Making"[1] addressing the "basic question" of whether, and under what conditions, subscribers to the various service offerings of communications common carriers should be allowed to resell such services to others or to participate with others in the sharing or joint use of such services, and, if so, whether and to what extent the Commission should regulate any such resale or shared use.

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[1] 47 F.C.C. 2d 644 (1974).

2. Twelve "items of inquiry" were established by the Commission,[2] and interested parties were requested to direct their comments to those enumerated items.[3] According to the Commission, its "primary objective" in this proceeding is to acquire information which will enable it

> "to establish policies with regard to resale and shared use of common carrier facilities and services and to take action necessary to effectuate such policies."[4]

3. The instant proceeding has its precursors in the form of two proposed rule makings and an adjudicatory proceeding, all of which were incorporated for resolution under the broad scope hereof.[5] The several issues and

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[2] MCI Telecommunications Corporation (MCI) petitioned the Commission to enlarge the number of items of inquiry to include an issue pertaining to the need to adopt a "new" carrier system of accounts in light of emerging competition in the communications marketplace. Such Petition was denied by the Commission. Memorandum Opinion and Order, ___ F.C.C. 2d ___ (F.C.C. 74-1030) released October 3, 1974.

[3] DATRAN, *infra*, will address each major area of issue in the belief that this approach, in this first round of comments, permits a clearer exposition of its position.

[4] 47 F.C.C. 2d 657.

[5] These are:

RM-1997--A "Petition For Rule Making," filed on June 13, 1972, by MCI, urging the Commission to adopt rule provisions barring "alleged sharing of circuits, resale of bulk communications facilities, single user concepts, and other methods" used to obtain primary communications facilities for provision of services to others or requiring that those obtaining and providing services to others qualify and operate as regulated common carriers.

(Footnote continued on Page 3)

sub-issues, altough all interrelated to varying degrees, represent, in essence, long-standing controversies which the Commission seeks to resolve through this single vehicle rather than by separate treatment of each.[6]

DATRAN Interest

4. DATRAN was organized in 1968 specifically to provide digital data communications service to data processing entities and organizations whose computing needs were becoming increasingly reliant upon communications channels and facilities. The existing facilities of the then-established carriers, as well as rate and tariff practices formulated in respect thereof, generally were inadequate to satisfy the growing

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(Footnote continued from Page 2)

RM-2218--A "Petition For Inquiry and Rule Making," filed on June 25, 1973, by the Western Union Telegraph Company (Western Union), urging the Commission to institute an investigation into whether so-called "pseudo carriers" and "value-added carriers" entering or seeking to enter the competitive marketplace would provide innovative service offerings in a manner consistent with the public interest.

Docket F.C.C. No. 19746--An adjudicatory proceeding resulting from the filing of a formal complaint on September 1, 1972, by the American Transport Association (ATA), questioning the lawfulness of the American Telephone and Telegraph Company (AT&T) private line tariff provisions which permit a single customer, Aeronautical Radio, Inc. (ARINC), to obtain service on behalf of itself and air transport carriers under terms and conditions which are unavailable to other competing transportation carriers.

[6] This proceeding was presaged by language in several previous Commission actions. See, e.g., In Re Application of Packet Communications, Inc., 43 F.C.C. 2d 922, 925 (1973); ATA v. AT&T, 41 F.C.C. 2d 2, 6 (1973).

needs of data processors.[7] In terms of both cost and efficiency, therefore, there existed a substantial breach between the needs of data processors and the availability of adequate communications services.

5. In November 1969, DATRAN filed a series of applications with the Commission for authorization to construct and operate a network of microwave radio facilities over which it would provide digital communications services. Essentially, proposed DATRAN facilities would permit data processors to link their digital computing networks to compatible communications facilities to achieve cost and performance levels that could not be realized over the existing analog or voice network. Additionally, DATRAN's applications for authorization promised tariff rates and classifications fully responsive to the unique requirements of data processors.

6. DATRAN's applications subsequently were granted by the Commission which previously had accorded DATRAN recognition as a "special" specialized common carrier by virtue of the unique nature of its proposed digital service offerings. The Commission had noted that DATRAN's proposed network was "markedly different" from those proposed by other so-called specialized common carriers as DATRAN "alone" had proposed a switched, digital network exclusively for

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[7] Stanford Research Institute Reports (Docket F.C.C. No. 16979), Report No. 7379B, Vol. 1, at 43-54 (1969).

data transmission.[8] Significantly, the Commission authorizations were premised upon a finding that DATRAN proposed services would further the public interest, convenience and necessity.

7. DATRAN presently is providing private channel, digital services between the cities of Houston and Chicago, including major points between these, pursuant to its Tariff F.C.C. No. 1. The DATRAN network will be extended early in 1975 from Houston to the West Coast and, subsequently, from Chicago to points east, establishing thereby a truly nationwide digital network.

8. Commencing early in 1975, DATRAN will initiate switched, digital service over its network in order to meet market demands for superior quality, digital transmission service on other than a private line or dedicated basis. Thus, DATRAN will provide digital data services that will be billed to subscribers on an economical and efficient "use" basis.

9. To date, DATRAN has expended in excess of $60 million in designing, constructing and operating its unique digital network. Additional amounts of capital investment will be required in order to continue construction to other geographic areas and to commence full operations.

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[8] See Specialized Common Carrier Services (Docket F.C.C. No. 18920), 29 F.C.C. 2d 870, at 907, 924 (1971).

Accordingly, as a "primary supplier"[9] of communications channels and facilities, DATRAN has a direct and substantial interest in the instant proceeding which conceivably could lead to a complete restructuring of the domestic communications industry through the establishment of regulatory policies and implementing programs radically different from the *status quo*.

The Overriding Factor in This Proceeding

10. Resolution of the issues posed in this proceeding, and the implementation of policies reflecting Commission determinations herein, doubtless will have a dramatic effect upon the future domestic communications industry. The prospect of change is only of secondary importance, however, when considered in terms of the Commission's mandate to further the public interest in efficient and economic communications. The fact is that the public interest stands to be affected directly and substantially, on both a short and a long-term basis, by determinations that may effect structural changes in the communications industry. That is to say, the Commission already has declared and seeks to establish a policy of competition in respect of

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[9] The term "primary supplier" or "primary carrier," as used herein, denotes an entity which constructs *and* operates its own intercity communications channels and facilities, as opposed to entities which obtain such channels and facilities from other carriers and, in turn, utilize these in the provision of communications service to others. Examples of the latter would include so-called "value-added" carriers and, more generally, "middlemen" or "brokers" of communications service.

the specialized business communications segment of the domestic communications industry. Its decisions in the Specialized Carrier[10/] and DOMSAT[11/] proceedings, and relevant actions taken thereafter, leave little doubt in this regard. Yet, the broad range of potential alternatives, explicit and implicit, posed by the Commission herein bear significant implication for the prospective nature of any developing competitive market structure.

11. Central to this proceeding, notwithstanding issues which may seem to indicate otherwise, is AT&T and its position as reflected in tariff policies and provisions which literally serve "to control" the domestic communications industry. To contend that such is not the case ignores practical realities and, indeed, ignores the substantive nature of the three controversies which led directly to the initiation of this proceeding.[12/] In this regard, the Commission must not for a moment lose sight of the fact that AT&T, as the dominant supplier of domestic communications, has assumed a pronounced and aggressive philosophy[13/] and

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[10/] Docket F.C.C. No. 18920, 24 F.C.C 2d 313 (1970); 29 F.C.C. 2d 870 (1971).

[11/] Docket F.C.C. No. 16495, 35 F.C.C. 2d 844; 38 F.C.C. 2d 665 (1972).

[12/] See n. 5, *supra*.

[13/] See Letter from John D. deButts, AT&T Board Chairman, to AT&T shareholders, November 26, 1974, at 3.

position[14] against the introduction of competition into even limited segments of the domestic communications industry. If the Commission, therefore, permits AT&T "to control" the industry through its maintenance of tariff policies and provisions which can achieve that effect, or if the Commission adopts new policies and implements programs that permit further achievement of AT&T's ability to control the industry environment, established Commission competition policies likely will be impacted adversely and substantially.[15]

12. This undesired and unintended result will be achieved simply because AT&T presently is and prospectively will be the overwhelming primary supplier of communications services and facilities to "others" able or potentially to be able to obtain and sell such services and facilities to the public in direct competition with specialized carriers, both terrestrial and satellite, seeking to compete with AT&T

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[14] It would serve no useful purpose here to recount AT&T opposition to the Commission's competition policies taken before this Commission, the Congress, the courts, state regulatory agencies and the general public. These are extensive and well known. Such opposition has led directly to the antitrust suits initiated against AT&T by MCI, a consortium of interconnect companies, and, most recently, by the Department of Justice.

[15] For example, AT&T resale restrictions represent an "exception" to permissible subscriber use of AT&T services and facilities. There are, however, "exceptions" to the resale exception which permit subscriber resale of certain services and facilities. To the extent that such practices are or may be utilized by AT&T to permit it to remain a primary supplier of communications services and facilities, the prospect of the development of meaningful competition clearly is lessened.

through provision of their own services and facilities. As discussed in greater detail hereinafter, AT&T presently is able to compete indirectly, albeit effectively, with specialized carriers through maintenance of, or simple modifications to, its existing tariffs. The advantage to it, of course, is that it is able to move toward its stated corporate objective, the removal of potential competition, without necessarily soiling its hands or tarnishing its corporate image.

13. Accordingly, whatever determinations are eventually made by the Commission herein, which determinations presumably will be made upon application of the public interest standard, must be considered fully in terms of their probable impact upon the emergence, if at all, of a viable competitive environment for specialized communications services. DATRAN sincerely believes that the competitive environment for specialized communications services sought to be fostered by the Commission was not one in which AT&T would remain as a primary supplier of communications services and facilities and, through tariff manipulation, unilaterally might ordain or dub a chosen entity or class of entities to provide to the public specialized services that AT&T could not or would not itself provide.

The Statutory Framework

14. The Communications Act of 1934, as amended, (the Act), charges the Commission with the obligation "of

regulating interstate and foreign commerce in communication by wire or radio...."[16] Neither the Act nor administrative and judicial decisions thereunder provide the Commission with discretion in this regard.[17] Its mandate thus is absolute and applies to all such communications[18] and, significantly, "to all persons engaged" in provision thereof.[19]

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[16] Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. 151.

"Communication by wire or radio" is "the transmission of writing, signs, signals, pictures, and sounds of all kinds" by wire or radio between the points of origin and reception of such transmission, and it includes all facilities and services necessary to such transmission. See sections 3(a) and 3(b) of the Act, 47 U.S.C. 153 (a)-(b).

[17] In its Notice of Inquiry herein, at 47 F.C.C. 2d 654, the Commission appears to suggest that it may not be obliged to regulate communications services other than those provided by "established carriers which own and operate their own lines of communication." DATRAN could not concur in such a Commission position. Further, the Commission suggests that a want of authority to regulate certain communications offerings may require it to go before the Congress for additional jurisdictional authority. Quite to the contrary, DATRAN believes the Commission would need to go before the Congress to obtain authority not to regulate any de facto communications offering, whether provided by an "established carrier" or otherwise.

[18] In its Docket F.C.C. No. 16979, The Computer/Communications Inquiry, the Commission refrained from regulating the communications function or element within a service offering, the primary thrust of which was to accomplish a data processing purpose. In essence, the Commission did not refuse to regulate "communications;" rather, it recognized and declined to regulate a broader offering which, in incidental part, was comprised of communications elements. 28 F.C.C. 2d 277-278.

[19] Section 2(a) of the Communications Act of 1934, as amended, 47 U.S.C. 152(a).

15. A person engaged in the provision of communications service to others is deemed to be a "common carrier" or "carrier,"[20] and is subject to the provisions of Title II of the Act. Specifically, Section 214 requires prior Commission approval for construction or acquisition and operation of transmission facilities by a carrier or other entity;[21] Sections 201 through 205 establish the bases upon which communications services may be afforded the public by a carrier over its authorized facilities;[22] and remaining Title II provisions, as well as other provisions in the Act, address matters pertaining to various aspects of common carriage and communications service provision. The Act thus provides a comprehensive scheme for direct regulation of common carrier communications services and providers thereof.

16. Significant in addition to the Act's provisions and Commission rules and regulations implemented thereunder are common carriers' tariffs filed with the Commission in respect of their service offerings.[23] Such tariff schedules represent essentially the focal point of service between

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[20] A "common carrier" or "carrier" is defined generally in the Act at Section 3(h), 47 U.S.C. 153(h), as:

> "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy...."

[21] 47 U.S.C. 214; See MacKay Radio and Telegraph Company, 6 F.C.C. 562 (1938).

[22] 47 U.S.C. 201-205.

[23] These are filed pursuant to Section 203 of the Act, 47 U.S.C. 203.

offering common carriers and the public. Thus, tariff terms and conditions constitute the basis of and for any relationship that develops between offering carriers and public subscribers. When filed and accepted by the Commission, carriers' tariffs are given the force and effect of law; and the carriers indeed are obliged to enforce affirmatively terms and conditions set forth in their tariffs.

DATRAN Comments

17. Rather than seeking to address each item of inquiry as set forth in the Commission's Notice of Inquiry, DATRAN has determined to direct its initial Comments toward the four broad areas of express Commission concern--resale, sharing, single user status, and government regulation. DATRAN believes that its position, at least for purposes of opening comments in this proceeding, is best made clear through more general comments in these four areas.

On Resale

18. The Commission indicates[24] that carriers have never been called upon, either formally or informally, to justify tariff restrictions which forbid "resale" of

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[24] 47 F.C.C. 2d 649.

communications service to others.[25] These are long-standing and essentially have achieved the force and effect of law.

19. Restrictions on resale have been an incident of public utilities service provision for many years. For example, it was concluded long ago in a proceeding which upheld a regulation prohibiting "remetering" or "submetering" of electrical service that such regulation:

25/ Pertinent AT&T tariff provisions which preclude resale of communications service by others may be found in AT&T Tariff F.C.C. No. 260, as follows:

> 2.2.1 A private line service may be used. . .
> (A) For the transmission of communications to or from the customer and relating directly to the customer's business.
>
> * * * * *
>
> 2.2.3 Private line services shall not be used for any purpose for which a payment or other compensation shall be received by. . .the customer. . .or in the collection, transmission or delivery of any communications for others...
>
> * * * * *
>
> 2.5 Definitions
>
> * * * * *
>
> Customer. . .No one [with certain exceptions] may be a customer for a private line service who does not have a communications need of his own.

These restrictions have their counterparts in other AT&T and Western Union tariffs.

> "...secures equality of rates and of service and prevents rebates and discrimination, and this is enough to justify us in saying there is nothing either unreasonable or arbitrary about it."[26]

Significantly, the D.C. Public Utilities Commission had concluded that the absence of such a restriction on submetering "would affect the whole rate structure of the power company..." and that, therefore, the restriction was "a reasonable protection to the revenues of the company,"[27] which revenues it had a right to protect. From the point of view of the ultimate consumers of electricity, the Utilities Commission concluded, and the Court affirmed, that the absence of such a prohibition would "inevitably result in discriminations,"[28] and that it was the utility's duty to avoid or prevent discrimination likely to occur whenever a utility permitted others to remeter or resell service.[29] Thus, resale restrictions were viewed as beneficial to the utility and to the using public.

20. In the communications industry, resale restrictions appear to have achieved a status of propriety through

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[26] Lewis v. Potomac Electric Power Company, 64 F. 2d 701, 702 (D.C. Cir. 1933).

[27] Id.

[28] Id.

[29] In some instances, electricity was furnished by property owners to tenants as a part of the rent. In other instances, electricity was sold by property owners to tenants at the regular retail rate, causing to accrue as "profit" to the property owners the difference between such retail rates and the wholesale price they paid to the utility for service.

this Commission's action, and subsequent Supreme Court affirmation thereof, in the Ambassador Case.[30] Deciding that it had jurisdiction over charges collected by hotels for telephone service, the Commission issued an order which resulted ultimately in the filing of a telephone company tariff provision which forbade hotels from rendering any charges for telephone services provided hotel guests additional[31] to those necessary to reimburse the hotels for actual toll charges levied by the telephone company. The Supreme Court stated that:

> "Such a tariff regulation is not invalid per se merely because, as to the communications service and its incidents, it places limitation upon the subscriber hotel as to the terms upon which he may invite others to communicate through such facilities."[32]

Thus the Court determined that, subject to questions of justness and reasonableness which were uniquely the subject of Commission determinations in the first instance, resale prohibitions constituted "a valid regulation of the subscriber's use" of telephone facilities[33] so long as telephone companies did not, in the guise of regulating a communications service, also regulate the hotel business.

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[30] Ambassador, Inc. v. U.S., 325 U.S. 217 (1945).

[31] The record indicated that some hotels were surcharing their guests a flat 10 percent of the telephone tariff rate for interstate service with a $1.00 minimum and a $3.00 maximum charge per call.

[32] Ambassador v. U.S., 325 U.S. 324.

[33] Id., at 325.

21. As no formal challenges have since issued respecting the question of unreasonableness in such use prohibitions, these have continued in effect through established carriers' tariffs since that time.

22. Restrictions on use along the lines of resale have had their practical benefits. Hotels, for example, were not interested in becoming subject to Commission jurisdiction through their provision of telephone service. The telephone company had no real stake in the outcome of this controversy since the objectionable hotel practices did not impact it, either technically or economically.[34] Additionally, it may be surmised that the Commission was not truly interested in extending its regulatory authority to reach hotels, nor was it likely that the Commission desired to become the agency to which numbers of the public would come with complaints concerning hotel-provided telephone service and charges.

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[34] Significantly, hotel communications "offerings" were not an alternative to telephone company service; rather, these consisted part and parcel of telephone company services. Indeed, it was the Commission's theory, rejected by the District Court and the Supreme Court, that the contractual relationship between hotels and the telephone company for telephone service created an agency relationship as between these two in respect of hotel guests. As indicated both above and more fully below, the stake of AT&T in certain areas of application of its resale and third party use restrictions (i.e., in respect of its non-monopoly or competitive service offerings) is a substantial one since competing providers of communications services and facilities provide an alternative supply of basic services which would impact AT&T's status as a primary supplier.

23. DATRAN believes that cascading technological advances in the communications art, many of which were initiated by or related to the proliferation of the electronic computer in the 1960's, have cast existing resale restrictions in an unfavorable light. No longer are these viewed as reasonable restrictions from which are derived mutually beneficial results for the carrier, the Commission, and the public, as above indicated; rather, these are now viewed generally as obstacles which impede or, at their worst, prevent[35] the development and marketing of diverse new service offerings to the public.

24. Whether or not the removal of all existing resale restrictions will benefit the public interest must be considered and evaluated by the Commission in terms of its weighing or balancing the likely results of their removal against their permitted continuance. As the results of their permitted continuance are more easily predictable, the more

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35/ As early as 1965, tariff resale restrictions were relied upon by AT&T and Western Union as appropriate bases upon which to deny Bunker Ramo Corporation, a non-regulated entity, communications services and facilities it required to provide a proposed service offering to the brokerage industry. Bunker Ramo was attempting to enhance its existing brokerage services by adding thereto a capability that would permit the processing of stock orders by its broker customers and, in addition, would permit the switching of "administrative messages" between or among its broker customers. AT&T and Western Union refused to provide communications services and facilities to Bunker Ramo to render service enhancements on the grounds that the proposed additions would result in Bunker Ramo's engagement in "unauthorized" commom carrier undertakings and would be in violation of tariff resale prohibitions.

difficult undertaking will be a determination of the likely ramifications of their removal. DATRAN believes that ascertainment of these ramifications is rendered considerably more complex by the existence of Commission policies which favor the introduction and maintenance of a competitive environment in the provision of specialized communications services. It is in substantial respect of these policies that the Commission must reach its ultimate determinations herein.

25. A removal of all resale restrictions, DATRAN believes, would impact adversely specialized common carriers seeking to compete with AT&T and Western Union through provision of specialized communications services over their own channels and facilities. To the extent that such removal may precede the establishment and operation of specialized carriers over those routes which these, including DATRAN, have been certificated to serve, their viability is threatened.

26. Under prevailing tariff provisions, resale restrictions constitute "exceptions" to a subscriber's lawful use of communications services and facilities supplied it by a primary carrier and, in their essence, serve to insure that a primary carrier is not placed in the position of competing in the marketplace with itself through its own customers. Thus, removal of resale restrictions would place a carrier in the position of potentially competing with itself, since provision of service by its customers to others would mean

that the carrier would not be providing service to those others who are served by its customer.

27. Were there still to exist a monopoly market in respect of private lines services, a removal of all restrictions on resale doubtless would serve the public interest. Inefficient and unresponsive services of primary carrier-monopolists could be obtained and fashioned by others to fill the void to meet existing and unmet needs of communications users. To any measurable extent that the primary carrier-monopolist would lose business to those entities who would provide its services to others, the monopolist itself would be motivated to fashion and provide improved service to communications users.

28. The presence or potential presence of specialized common carriers complicates the situation, however. Their raison d'etre was and is to plug the substantial service gaps in the offerings of primary carrier-monopolists and to fulfill the expressed needs of those in ignored communications submarkets. To the extent that primary carrier-monopolists are afforded or undertake an opportunity to plug their service gaps through others, there results an ability of such monopolists to compete indirectly with specialized common carriers while minimizing revenue losses to competition, if any, and remaining removed and aloof from day-to-day market competition. Thus, primary carrier-monopolists will retain the ability to market their product to others--virtually agents under their control--

who provide end service to users in direct competition with specialized common carriers.

29. On October 13, 1974, AT&T revisions to its WATS and private line tariffs were permitted to become effective, which revisions essentially removed resale restrictions as applied to AT&T customers

> "certificated by the Federal Communications Commission...to acquire and operate facilities to perform data switching for others."[36]

Thus, so-called "Composite Data Service Vendors" or "value-added carriers," as these are more commonly called, are licensed, both by the Commission[37] and by AT&T tariff, to resell AT&T communications services through the "augmentation" or "adding value" thereto, and providing these directly to the public. In essence, there has been created and implemented an "exception" to the resale exception. Basically, the augmentation of AT&T's primary service involves use of AT&T channels, in conjunction with computers and software of value-added carriers, to establish special networks to accommodate the data processing needs of customers or "patrons" of value-added carriers.

30. DATRAN stands to be affected directly and substantially by the operation of value-added carriers since

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[36] See, e.g., AT&T Tariff F.C.C. No. 260, 2.5.

[37] Certificated value-added carriers include Packet Communications, Inc., Telenet Communications Corporation, and Graphnet. The latter has filed and is operating pursuant to its Tariff F.C.C. No. 1.

these will seek to develop and serve a communications submarket served by DATRAN. There will result competition, not necessarily between DATRAN and AT&T; but, rather, between DATRAN and a chosen instrumentality of AT&T.

31. Because value-added carriers propose to augment or enhance AT&T primary service offerings, it is probable that the removal of resale restrictions for such carriers will stimulate research and development and will lead to markets for new equipment and new services. As the Commission has found, the public interest likely will be furthered. By way of analogy, AT&T provides apples, oranges and grapefruits to value-added carriers and these, in turn, "resell" such produce in the form of enriched fruit cocktail.

32. Where, however, a reselling entity proposes not to enhance or augment basic service but, rather, proposes merely to resell a service of a primary carrier, little, DATRAN believes, may be expected in the way of technological advance or market benefit. Again, by way of analogy, AT&T "produce" is not enriched in the form of fruit cocktail; it remains as apples, oranges and grapefruits, however sliced.

33. AT&T's experimental "Series 11,000 Service" offering, and terms and conditions applicable to the use thereof, represent a prime example of the type or nature of "unenriched" third party traffic carriage that DATRAN believes would not serve to further the public interest. Commenced

in 1969 and permitted to lapse in 1972, Series 11,000 was hailed by the Commission in 1970 as an

> "...offering [of] a wideband private line service over certain high-capacity cable and radio routes of the telephone companies in which the sharing by joint users will be permitted on virtually an unlimited basis...."38/

The offering, ostensibly intended to satisfy large users' needs, was a failure in this regard. However, certain small entities, allegedly with a communications "need" or "requirement" of their own between designated points on a Series 11,000 route, obtained such service and, under liberalized sharing and joint use arrangements, proceeding to subdivide or channelize the 60-channel circuit and market or broker as many as 59 voice-grade channels to the general public.

34. No integral service enhancements were rendered by these brokers, nor was it likely that these would ever enhance the basic AT&T offering, as subdivided. What was offered was merely a private line service at rates substantially below rates otherwise applicable to like, primary service provided directly by AT&T, and at rates approximate to those proposed by specialized common carriers for like service. Of course, the broker, in addition to serving as agent for AT&T for purposes of collecting fee payments from those who jointly used with it the Series 11,000 circuit, also charged

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38/ Docket F.C.C. No. 16979, 28 F.C.C. 2d 291.

a "management" or "administrative" fee, which fee constituted its profit.

35. In view of the above, DATRAN believes that removal of resale restrictions should be effected, as a matter of Commission policy, only in those instances where an entity intending to resell a primary carrier service to others proposes to augment substantively a basic or primary carrier service. That is, resale should be permitted only where substantive additions or improvements are proposed to be made to primary carrier service and, hence, such improvements will become part and parcel of an enriched offering to be made available to the public by the reselling entity.

36. As DATRAN has indicated above, any resale of communications service is subject to Commission regulation, as is the provider thereof. The Communications Act of 1934, as well as precedent established thereunder, provides no alternative to the Commission in this regard. Accordingly, those intending to "acquire or operate" primary carrier channels and facilities for provision of communications services to others will require Commission certification under Section 214 of the Act prior to their doing so. It is at this juncture that the Commission will be afforded an opportunity to evaluate a proposed resale offering to determine its precise nature. It is at this time that the Commission will be able to ascertain, pursuant to data supplied it by an intended reseller under Part 63 of the Commission rules, whether the proposed resale offering

contains service-integral enhancements or whether it amounts to a mere "straight" resale. If the Commission concludes that the proposed resale offering consists of integral enhancements to basic carrier service as, for example, DATRAN's acquisition and incorporation of Southern Pacific channels into its unique digital network, it may then certificate such service and its provider. If, on the other hand, the Commission determines that the proposed resale offering promises no enhancement, or merely insubstantial or contrived enhancements to basic, primary carrier service, it can refuse to certificate the service or its intended provider.

37. The tariffs of primary carriers can be fashioned to accommodate Commission Section 214 determinations rendered in light of proposed resale offerings. Simply, tariff provisions relating to primary carrier services may be formulated to state that, as a condition precedent to subscription to and use of such services by those desiring to resell to others, prior Commission certification must be obtained. In essence, Commission certification will establish a proposed reseller's eligibility to obtain primary carrier service for resale.

38. This approach is not a novel one as it now serves to determine, under AT&T Tariffs F.C.C. Nos. 259 and 260, who may be eligible to take certain of AT&T's WATS and

private line services as "Composite Data Service Vendors."[39/] Additionally, DATRAN's Tariff F.C.C. No. 1, at Paragraph 3.3.2(B), has been drafted in such a manner as to accommodate any Commission determinations rendered under Section 214 criteria. Such DATRAN tariff provision states that:

> "Private Data Transmission Services shall not be used for any prupose for which the subscriber shall realize a profit from the resale of communications services, unless such use has been approved by the Federal Communications Commission."

Accordingly, the primary carrier "tariff environment" presently exists, and may be extended,[40/] to complement Commission Section 214 determinations regarding proposed resale offerings.

39. The Commission should realize that an unconditioned removal of all resale restrictions likely will lead to a multitude of would-be purveyors of communications services. All would seek to utilize primary carrier channels and

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[39/] See, e.g., AT&T Tariff F.C.C. No. 260, Para. 2.5, where a Composite Data Service Vendor is defined as

> "a customer that has been certificated by the Federal Communications Commission pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities to perform data switching for others."

[40/] To the extent that policy decisions rendered by the Commission herein may necessitate a Commission order requiring that primary carriers undertake to modify their existing tariff terms and conditions to conform to such policy determinations, it would appear that Section 205 requisites pertaining to a "full opportunity for hearing" would have to be satisfied. The Commission, therefore, should consider Section 205 requisites as these dictate the need for the nature or type of hearing that should be implemented in future stages of this proceeding.

facilities for provision of further service to the public. Some would enhance those basic channels and facilities; others would not. A line representing a demarcation of the public interest must be drawn between these two groups or classes of entities, and the latter must be precluded from reselling unenriched services.

40. It appears to DATRAN that experience discloses that the only benefit "straight resellers" likely will offer is in the area of price.[41/] And, were the Commission to find and conclude that mere lower prices for derived, primary carrier channels, without more, was in the public interest, then serious questions would arise and require resolution as to the validity or propriety of rate levels charged by primary carriers for their resold offerings and, significantly, whether the Commission will have afforded specialized common carriers a sufficient opportunity to demonstrate that effective competition among primary carriers would serve to fulfill those service deficiencies which would tend to drive users to straight resellers.

On Sharing

41. In its Tariff F.C.C. No. 1, DATRAN establishes that its prohibition on resale of DATRAN services

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[41/] That is, unit price per derived primary carrier channel. This price does not include "management" or "administrative" fees which brokers charge end-users in addition to the derived channel unit price. It is suggested, however, that the two charges, when computed together, result in only a minimal savings, if any, to such end-users in view of the changing environment caused by competition.

> "does not prohibit an arrangement between the customer and authorized user to share the cost of Private Data Transmission Service, nor does it prohibit the use of channels by a communications common carrier."42/

Thus, sharing of DATRAN facilities is permitted in the belief that users who might obtain, through sharing, more economic and efficient communications service ought to be able to do so. Implicit, of course, in this tariff provision is a requirement that sharing arrangements be bona-fide, i.e., that they be effected on a true, cost-shared basis among participating entities and that no element of profit accrue to any participant through such arrangements.

42. DATRAN believes its philosophy in this respect is sound, and that it is wholly consistent with its above-stated position with respect to resale. To the extent that primary carriers, including DATRAN, and certificated entities which substantively enhance basic services of primary carriers may be unable to appeal to the wide and growing spectrum of user needs, cost-sharing arrangements among users will provide an additional service alternative. And, even though DATRAN believes that an effective competitive environment in the provision of communications service to the public will obviate any need among users for widespread sharing arrangements--since competitors logically will be motivated to

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42/ DATRAN Tariff F.C.C. No. 1, Para. 3.3.2(B).

fulfill any service voids sought to be remedied through user sharing, it nevertheless believes that permitted sharing will assist to guarantee the widest availability of alternatives.

43. The apparent reason for traditional limitations of sharing of private line and other services to voice-grade and under channels is to provide protection to revenues (and the overall rate structure) of primary carriers in respect of their voice-grade services. That is to say, were sharing liberalized to extend to greater than voice-grade channels (AT&T's Series 7,000, 8,000 and 10,000 services, for example), primary carriers likely would be competing with themselves through sharers of their above voice-grade circuits to the extent that users would obtain and share a larger circuit to satisfy their voice-grade needs. This would effectively lessen greater revenues obtained by primary carriers from their provision of voice-grade services. DATRAN questions whether, on balance, this is sufficient reason to continue to deny economies and efficiencies that may accrue to the using public by an extension of sharing opportunities.

44. There are, however, two significant conditions which, DATRAN believes, must attach if sharing provisions are extended. First, DATRAN believes that there should remain the requirement that all sharers have a communications need of their own in respect of the shared facility. While such a condition, of course, does not remove the potential of

reselling derived channels,[43] it nevertheless would preclude one having no need to communicate from obtaining a channel and providing it to others. In this regard, DATRAN believes that Section 93.4 of the Commission's Rules and Regulations pertaining to the cooperative use of radio stations in the Land Transportation Services[44] provides a model or basis for implementing procedures which would serve to guarantee that extended sharing be bona-fide and undertaken and accomplished on a strict cost-sharing, non-profit basis. The Commission should consider the adoption of similar regulations in respect of extended sharing arrangements to insure that the requirements of Section 214 and Part 63 of its Regulations are not circumvented by resellers of communications services allegedly sharing a bulk facility. Such regulations could indeed be formulated to complement the regulatory scheme urged above by DATRAN with respect to the submission of Section 214 applications by those entities seeking to resell primary carrier services.

45. Second, it is incumbent that the Commission limit or restrict extended sharing to discrete broadband

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[43] In regard to the lapsed AT&T Series 11,000 service, brokers essentially maintained that their communications need extended to 1/60th or 1/30th of the large circuit. Thus, their minimal communications need in respect of the large circuit served to satisfy AT&T that applicable tariff requirements were met.

[44] 47 C.F.R. 93.4.

facilities of primary carriers. Thus, sharing of communications purchased under a multiple circuit bulk tariff, such as AT&T's TELPAK offering (Series 5,000) should be strictly prohibited. TELPAK, in its essence, is a contrived pricing scheme designed to provide discounts to users who subscribe to a multiple of non-discrete private line channels. TELPAK users thus are afforded an opportunity to purchase private line service at lower rates per channel unit than those set forth in non-TELPAK private line tariffs. Inasmuch as there is no significant cost differential in the supply of private line service between the non-TELPAK and TELPAK pricing categories, the validity of TELPAK, in view of the emerging competitive environment and AT&T's apparent objective of "relating prices more closely to costs,"[45] is very much in question. Indeed, whether or not TELPAK is compensatory, and whether it is subsidized by AT&T's monopoly or other services has never been resolved and is presently at issue in the Private Line Rate Case (Docket F.C.C. No. 18128). Thus, were sharing of TELPAK permitted, or were entities even permitted to obtain primary service from AT&T under TELPAK rates and resell same, however enhanced substantively,[46] long-standing issues as to the validity of the TELPAK rate structure would be compounded by an extension of its effects into the delicate, emerging competitive marketplace.

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[45] See AT&T's alleged justification, in part, for its Hi-Lo private line rate revisions currently at issue in Docket F.C.C. No. 19919.

[46] "Composite Data Service Vendors" may not, under current AT&T tariffs, utilize TELPAK for provision of data message-switching service to others. See AT&T Tariff F.C.C. No. 260, Para. 3.2.5(A).

46. Permitted sharing of TELPAK among certain users has been rejected by the Commission, and discriminatory sharing provisions were required to be struck from appropriate AT&T tariffs.[47] Previously, in an attempt to remove the tariff discrimination which permitted some to share and others not to share TELPAK, the Commission had prescribed "unlimited sharing" as the preferred method for eliminating the discrimination found to exist.[48] On appeal, however, the Court concluded that such prescription was unwarranted, in part because the Commission had failed to formulate such prescription "after full opportunity for hearing" within the meaning of Section 205 of the Communications Act.[49] Thus, a removal of any capability to share TELPAK was effected in lieu of extending a sharing capability to all users.

47. Assuming that the Commission would not again run afoul of the requirements of Section 205 of the Act, it conceivably could conduct this proceeding with a view toward obtaining evidence sufficient to support an order that AT&T file revised tariffs providing for unlimited TELPAK sharing. Such unlimited sharing likely would increase the average

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[47] Decision and Order on Remand, In the Matter of Telpak Sharing Provisions (Docket F.C.C. No. 17457), 31 F.C.C. 2d 674 (1971).

[48] Docket F.C.C. No. 17457, 23 F.C.C. 2d 606 (1970).

[49] AT&T v. F.C.C., 449 F. 2d 439 (2nd Cir. 1971).

fill factor of AT&T facilities to nearly 100 percent.[50] This in turn would increase TELPAK costs and likely would lead to an increase in TELPAK rates. This would have the net effect of reducing prices for non-TELPAK service and increasing prices for TELPAK service. In the short or long run, whatever the case might be, the economics of TELPAK would disappear. There would be no price incentive to obtaining a channel under shared TELPAK than otherwise would be available by subscribing directly with AT&T for a single, private line channel at the individual rate.

48. While, arguably, unlimited sharing would lead to the eventual demise of the TELPAK rate offering--a desirable and just result by any measure--specialized common carriers would be impacted directly and substantially to the extent that the unjustness and unreasonableness of the TELPAK pricing scheme would be perpetuated through extension to many others not now able to avail themselves of its price preferences because of their limited needs.

49. For these reasons, DATRAN urges that sharing be restricted to voice-grade channels or to discrete high

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[50] The present fill factor is substantially less than 100 percent since a TELPAK user's objective is not to utilize fully facilities provided him at a discount rate; rather, his objective is to satisfy his existing communications needs as cheaply as possible. So long as those needs are more cheaply satisfied by TELPAK rates as opposed to rates which he would have to pay for the number of needed circuits at the ordinary private line rates, he will remain a TELPAK subscriber.

capacity wideband channels. Any extension of sharing beyond these restrictions likely will place specialized carriers in an intolerable competitive position.

50. In denying petitions for reconsideration of an order permitting AT&T to initiate its now-defunct Series 11,000 experimental offering, the Commission sought to distinguish TELPAK from the subject offering. The Commission stated:

> "The thrust of our discussion of Telpak and series 11000 in that order [authorizing Series 11,000 service] was directed to the basic structure of the two offerings. Telpak is a pricing arrangement for ordinary private line channels. The justification for the reduced rate is based on competitive necessity rather than on cost of service. Series 11000, on the other hand, allegedly uses a method of providing the service that is sufficiently different from Telpak and other private line services so that it is claimed that sufficient cost differences exist to justify the differential in rates."51/

This "different method" of providing service was delineated from TELPAK, as follows:

> "The trial service, series 11,000, differs from Telpak and the other private line services in that, (1) the service is experimental, offered only in a specified area for a limited time, (2) the new service is a two-point service only and not multipoint, (3) the new service is offered only over certain designated high capacity physical routes of the telephone company, (4) the individual data or voice channel derived in the new service from

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51/ Memorandum Opinion and Order (Docket F.C.C. No. 18128), 21 F.C.C. 2d 1, 7 (1970).

> the wideband facility will be furnished only from such physical facility and will not be furnished over diverse routes and (5) the unlimited sharing provisions in series 11,000 relate to the sharing of a discrete physical facility rather than a theoretical pricing concept."52/

51. It is in respect of distinctions similar to the above that DATRAN believes the line should be drawn between permitted and unpermitted sharing. When sharing is determined appropriate along criteria which reveal that the communications channel intended to be shared is a discrete physical facility rather than a mere "theoretical pricing concept," the sharing arrangement should be permitted provided that it is effected among participants on a true cost-shared, non-profit basis and, of course, provided that the rate for such discrete physical facility is in all respects justified by the primary carrier.

On The Single User Concept

52. DATRAN believes there is no justification for provisions in current AT&T and Western Union tariffs which accord special tariff treatment to specific entities or classes of entities.53/ In DATRAN's view, these provisions constitute *prima facie* violations of Section 202(a) of the Communications Act,54/ and their removal must be ordered by the Commission as soon as practicable.

52/ Memorandum Opinion and Order (Docket F.C.C. No. 18128), 20 F.C.C. 2d 383, 384 (1969).

53/ See, e.g., AT&T Tariff F.C.C. No. 260, Para. 2.2.1.

54/ 47 C.F.R. 202(a).

53. DATRAN sees little factual or legal distinction between the American Trucking Association (ATA) complaint responsible for the inclusion herein of issues addressing the single user concept and the complaint submitted by the National Retail Merchants Association (NRMA) in opposition to TELPAK sharing provisions over seven years ago. The latter, of course, led to Commission initiation of Docket F.C.C. No. 17457 which ultimately resulted in the removal of limited TELPAK sharing provisions found by the Commission and the Second Circuit to have been unlawfully discriminatory. In both instances, the complaining parties were excluded from tariff preferences and privileges extended to others.

54. In the instant complaint, ATA avers that preferences afforded ARINC and the airlines are denied it and other surface transportation carriers seeking to compete with the airlines for transport business. Significantly, ATA does not challenge the validity of the concept of preference extension to the airline industry; rather, it challenges its preclusion from obtaining like preferential treatment from AT&T and Western Union. In essence, its self-interest dictates that it be granted preferred status as opposed to the removal of such preferred status for the airlines.

55. DATRAN submits that any extension of the single user concept to include ATA, or any other association or organization for that matter, would not be warranted or justified in any circumstance for the same reason that limited TELPAK sharing could not be extended to other specified groups: the

discriminatory effect or result would not be removed or even lessened; rather, it would be increased. Indeed, were such preferences extended, particularly that which would qualify ATA or other associations to order private line facilities under substantial TELPAK rate discounts, "non-preferred" subscribers to ordinary AT&T private line services and, it is submitted, subscribers to AT&T and Western Union monopoly services would bear the brunt of such extended preferences. These would be required ultimately to provide increased revenues to offset or compensate for those sacrificed by virtue of an extension of TELPAK eligibility. This would be necessary in order for AT&T and Western Union to meet appropriate interstate revenue levels.[55]

56. AT&T justification for tariff preferences extended to the airline industry arise out of the old ARINC Case.[56] As the Commission recognized in its Memorandum Opinion setting the ATA complaint for hearing, differences between the 1937 communications environs and that of 1974

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[55] This circumstance is clearly distinguishable from that which involves AT&T allegations that the same ill-effects will result from AT&T revenue losses to specialized common carriers. In the first place, the issue as to whether TELPAK itself is even compensatory, and thus lawful, is still pending. Additionally, AT&T revenue losses to competition will result largely from an availability to subscribers of superior communications services. Losses attributable to an extension of single-user preferences, however, would be traceable to more tariff manipulations by AT&T and would not be accompanied by any actual communications enhancements or improvements beneficial to the public.

[56] ARINC v. AT&T, 4 F.C.C. 155, 162-163 (1937).

raise serious questions as to the relevance of the old ARINC precedent. Additionally, the Commission's analysis and apparent conclusion that the actual 1937 holding in the ARINC Case is inapplicable to relationships that presently derive in the airline industry[57] serves well, DATRAN believes, to dispose of purported AT&T justification for discriminatory preferences accorded that industry. Accordingly, DATRAN believes that no further elaboration additional to the Commission's is required at this time.

57. DATRAN submits, and the Commission must so realize from its experience in the TELPAK sharing proceeding, that the only effective manner in which to eliminate the cancer that is embodied in the single user concept is to promptly and completely bring about its removal. Such rapid surgery would be entirely consistent with the Commission's competition policies and thus the public interest, and, moreover, it would be consistent with DATRAN's position herein. Any of the favored organizations currently benefitting under the single user concept could continue to resell communications service to their members, affiliates, subsidiaries or whatever, provided only that the requirements above-recommended for resale eligibility are met. That is, such organizations must propose to enrich substantively primary carrier services for

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57/ ATA v. AT&T, 41 F.C.C. 2d 2, 4-5.

further provision to others. Straight brokering of primary carrier services should not at all be permitted.[58] To the extent that a physically discrete primary carrier facility may be shared among various participants on a bona-fide cost-shared, non-profit basis, such should be permitted pursuant to Commission regulation designed to govern such sharing arrangements.

58. Accordingly, in view of the above, DATRAN urges that the Commission adopt and implement a policy that would require any legal entity, whether an individual, a partnership, a corporation or any permutation thereof, to obtain and use common carrier services only for itself and for no other separate entities unless or until it has received Commission approval under Section 214 to resell enriched primary carrier service to others, or unless or until it has effectuated bona-fide sharing arrangements. If the competitive environment

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58/ Experience indicates that ARINC has the capacity to develop, implement and operate innovative communications-based systems to satisfy the special needs of the air transport industry. However, in the area of private line intercity communications, ARINC's role is little more than that of a communications broker. While ARINC has served to reduce somewhat the cost of private line channels to the airlines by availing itself of existing tariff preferences, its positive effect upon communications development has been limited. In essence, its expertise primarily has been directed, not toward optimal use of communications facilities but, rather, toward optimal use of prevailing tariff preferences. In the existing tariff environment, it has little incentive to do otherwise and, in a very real sense, it has served as an obstacle to specialized carriers seeking to provide the airlines with innovative service rather than arbitrary preferences.

sought to be fostered by the Commission is to be successful at all, and if innovative development and use of communications is to be encouraged, then subscriber markets must be opened to all providers of communications service. Artificial, unjustified and discriminatory barriers which tend to foreclose significant user market segments from specialized common carriers must be removed. Effective competition will not result until such obstacles are struck down.

On Commission Regulation

59. As indicated above, the Commission enjoys no discretion with respect to whether it may or may not regulate interstate communications services and providers thereof. Its statutory mandate is quite clear in that it has such obligations. This is not to say, however, that the Commission lacks discretion as to the nature or degree of regulation it imposes in any particular circumstance. Indeed, it may pick and choose among regulatory tools it has at its disposal, the guiding criterion, of course, being the furtherance of the public interest.

60. With this the case, DATRAN believes that the necessary degree of Commission regulation should be lessened considerably by the existence of a dynamic competitive market within which established carriers, specialized carriers, and sanctioned resellers all seek to compete. To the extent competition is real and results in effective price competition,

it is not likely that rate of return regulation will be either necessary or desirable. In essence, the forces of competition as these operate in a free, competitive market may be expected to provide a superior means to insure to the public an availability of economic and efficient communications services.[59/]

61. As indicated above, all entities seeking to sell or resell communications service should be required to make application for and obtain Section 214 authority from the Commission prior to providing any communications service. The requisites of Section 214 simply do not afford any alternative to such an undertaking. The Commission, in addition to applying Section 214 and existing Part 63 criteria to any submitted application, should, as a matter of policy and, if necessary, through amendment to Part 63, require that any proposed reseller substantively enhance or enrich primary carrier services as a condition precedent to any grant of authority. Thus the Commission will be provided an opportunity in the first instance to discharge its statutory responsibilities by exercise of control over all entrants into the communications market. As set forth in greater detail above, the Commission should reject any proposed resale of primary carrier services

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[59/] Carriers which provide otherwise competitive services in areas where there is, in fact, no competition, or carriers which enjoy franchises to provide monopoly services cannot be exempted from rate of return regulation. If anything, more careful and precise scrutiny will be necessary in order to guarantee that such effective monopoly service revenues are not utilized to subsidize competitive offerings.

which would not result in the enrichment thereof. Such rejection would serve to insure that those truly seeking to compete through communications service innovations are not adversely impacted by bare resale and thereby driven from the marketplace by entities who care little for service innovation and market development.

62. Subsequent to obtainment of Section 214 authority, but prior to the initiation of actual service provision, a reseller should be required to file and maintain appropriate tariffs with the Commission addressing the rates and terms and conditions of its service provision to the public. As was the case in respect of Section 214, DATRAN does not believe that the requisites of Section 203 of the Act[60/] provide any alternative to such submission of tariff schedules. Indeed, it is likely that, in a truly competitive environment, tariffs on file with the Commission may provide the best means by which would-be subscribers will be able to evaluate objectively the varied, competitive service offerings available to them.

63. Hopefully, as indicated above, initial Commission regulation of rates for competitive offerings will be minimal, at least until such time as the developing competitive market settles somewhat and assumes identifiable characteristics. If competitive forces function as these reasonably may be

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[60/] 47 C.F.R. 203.

expected, then a policy of minimal regulation, if any at all, could become the appropriate Commission regulatory standard. DATRAN firmly believes that a premature attempt by the Commission to regulate rates in an emerging competitive environment may hinder the development of new competitive offerings and may serve to deter new entities from entry into the market. As the Commission does possess discretion to regulate to degrees warranted by circumstance,[61] it should adopt a policy of flexibility, oversee the developing markets, and stand prepared to assert whatever stronger regulatory rate measures may be required. Predictably, however, the degree of rate regulation necessary will be inversely proportional to the development of meaningful competition.[62]

On Intercarrier Relationships

64. The thrust of the issues in this proceeding clearly addresses the nature of the arrangement for use of common carrier channels and facilities by public customers or subscribers. While the nature of the arrangement for use of intercity wideband and other channels and facilities between and among primary communications common carriers has been,

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[61] Docket F.C.C. No. 16979, 28 F.C.C. 2d 297-28.

[62] Presumably, if rates charged for competitive services are set too high, effective competition will force such prices downward to a reasonable level. If effective competition is lacking, it then will be incumbent upon the Commission, in the public interest, to assert a stronger regulatory arm.

in part, the subject of ongoing negotiations in Docket F.C.C. No. 20099, there has been informal indication that the Commission would prefer to treat this matter within the context of this proceeding. No formal order to this effect, however, has been forthcoming; and, in light of the apparent confusion on this point, DATRAN wishes to reserve its substantive comments on this matter for treatment in either Docket F.C.C. No. 20099 or in this proceeding, whichever one is ultimately declared by the Commission to be the appropriate forum.

65. As indicated above in reference to DATRAN's Tariff F.C.C. No. 1, there exist no prohibitions on the use of DATRAN channels by other common carriers, even where such use might result in resale for profit. DATRAN, in accordance with the philosophy extended in its own tariff, believes that no restrictions whatsoever should attach regarding the obtainment for use by one primary carrier of another's channels and facilities for incorporation within the obtaining carrier's communications service offerings. Such reciprocity would benefit DATRAN and, more significantly, the public interest since DATRAN would be provided an opportunity to extend, more rapidly than its own construction program will permit, unique DATRAN digital services throughout the United States.

Conclusion

66. DATRAN believes that its position in respect of the several primary issues raised in this proceeding is

reflective of the public interest. That is to say, were DATRAN's recommendations adopted and implemented by the Commission, the communications-subscribing public would be able to obtain more economic and efficient communications services to accommodate their varying needs. These needs, DATRAN believes, will be satisfied best in a competitive environment in which specialized common carriers, both terrestrial and satellite, will operate, and in which "enriching resellers" will be provided the opportunity of entry through a removal of arbitrary restrictions on subscriber use of primary communications facilities.

Respectfully submitted,

DATA TRANSMISSION COMPANY

Dated: December 11, 1974

COMMENTS OF THE SECURITIES INDUSTRY AUTOMATION CORPORATION

The Securities Industry Automation Corporation (SIAC) hereby submits its initial response to the Commission's Notice of Inquiry and Proposed Rulemaking herein, 47 F.C.C.2d 644 (1974).

The Securities Industry Automation Corporation (SIAC) is a wholly owned subsidiary of the New York Stock Exchange (NYSE) and the American Stock Exchange (AMEX), formed in 1972 as a vehicle by which the exchanges could carry out their obligations, statutory and otherwise, to improve the efficiency and effectiveness of the operations of the exchanges, their members, and other segments of the securities industry through SIAC's data processing and communications services.

The fundamental element of the securities market has always been communications -- communication of offers, quotations, last sale prices, confirmations, and relevant market information. The capital markets of the nation and the world are becoming increasingly interdependent and complex, and hence are demanding increased and better communications and information processing services.

Thus, recent years have witnessed an unprecedented growth in the information handling and automation services using advanced computer and communications facilities. The existence of SIAC is itself a recognition of the importance of the new techniques in our society. The Commission is to be commended for instituting this forward-looking inquiry, similar to the Computer Inquiry (Docket 16979), into the adequacy of the current tariff and regulatory structure governing the present use of communications services by users and groups of users.

SIAC, because it carries out an important responsibility of the self-regulatory agencies (the exchanges), has a vital, direct interest in all communication services used by the various segments of the securities industry. In carrying out its functions, SIAC, through its SECTOR program, is presently the customer for interstate communications services and facilities furnished by the American Telephone and Telegraph Company, Western Union Telegraph Company, MCI Telecommunications Corporation, and RCA Global Communications, Inc.

In addition to responding to the specific inquiries of the Commission in this proceeding, SIAC hopes that the description of the needs of the securities industry and of SIAC's present and future role therein will be valuable to the Commission as it formulates policy in these matters of critical national importance.

I. The Need of the Securities Industry for Improved Automation and Communications Services

A. Background

In order to understand fully SIAC and the various services it renders to the securities industry, a brief discussion of the securities markets, their development, and recent problems is necessary. The capital markets of the United States have been described as an "important national asset. . . . They have provided a means for millions of Americans to share in the profits of our free enterprise system, and have facilitated the raising of capital by new and growing businesses."* These markets are unique and unmatched elsewhere in the world in their consistent degree of liquidity. They are the "foundation of our national economy because they perform the vital function of allocating one of our most precious resources -- investment capital."[*]

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* Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess., Report on the Securities Industry Study 2 (Comm. Print 1973).

The growth of American business and its capital markets has permitted individual citizens, either directly or indirectly through investing institutions, to participate in the economic growth of the nation. Capital markets have been an essential ingredient for the growth of American business and what has been termed our "people's capitalism." "Securities markets in the United States are, in contemplation of law and in fact, public markets."[**] Indeed, by 1970 over 30 million individuals in the United States were shareowners of domestic or foreign companies, or one in every four adults owned shares or traded in securities markets of the United States.[***]

Securities markets, and especially the continuous auction markets, are in substance a communications system by which buyers and sellers of securities are able to "meet," negotiate, and execute transactions in securities through their respective brokers. The founding of what was to become the New York Stock Exchange occurred as a result of the need for brokers and dealers in securities to represent directly their customers or themselves. As a result, in the 18th century a merchant broker group began to meet daily at noon under the now famous Buttonwood Tree on Wall Street.*

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[*] SEC, Policy Statement on a Central Market System, SEC Securities Exchange Act Release No. 10,076 (March 29, 1973), CCH Fed. Sec. L. Rep. No. 473, pt. II, at 6 [hereinafter cited as SEC Central Market Policy Statement].

[**] SEC, Report of Special Study of Securities Markets, H.R. Doc. No. 95, pt. 1, 88th Cong., 1st Sess. 9 (1963) [hereinafter cited as SEC 1963 Special Study].

[***] The New York Stock Exchange, 1974 Fact Book 50.

Other "exchanges," such as the "curb" market, to which the American Stock Exchange traces its origin, developed almost spontaneously during the mid-19th century as more and more corporate securities were sold to the public. The "curb" market continued outdoors until 1921. It has been described colorfully:

> "Hundreds of tense, excited brokers, buying and selling stocks and bonds, milled about in apparent confusion, waving and shouting to telephone order clerks stationed at windows in rooms above the street. In order to be recognized by their clerks, brokers wore yellow homburgs, green derbies, or other colorful hats, or loudstriped jackets."**

But still the essence of this activity, and the activity beneath the Buttonwood Tree, was simply communications.

The "exchange" securities market as it developed in New York initially involved a "call system" whereby each security that was traded in the particular market was "called" and all buyers and sellers made their offers and bids and executed transactions in that particular security upon the "call." As the market expanded, the exchange began trading on a continuous auction basis, i.e., bids and offers for a particular security were made continuously. Prices were determined by the two-way auction system in which buyers competed with other buyers and sellers with other sellers, and thereby buyers and sellers achieved the best available price through this price competition. This fostered the initial centralized market whereby more sellers and buyers channeled their orders to this market and thereby obtained the best competitive prices.

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* The Buttonwood Tree Agreement, to which the NYSE traces its origin, was signed May 17, 1792.

** Coplin, The American Stock Exchange, in The Stock Market Handbook 119 (F. Zarb & G. Kerekes eds. 1970).

As a centralized national market, the exchanges provided greater liquidity, narrower spreads between bid and asked prices, up-to-the-minute data on stock prices and quotations, and competitive pricing through the interaction of many buyers and sellers in the auction market. The development of the centralized continuous auction market led to the need for more rapid and effective communication facilities since the market in a security was "open" on a continuous basis throughout the day. The telegraph initially supplied the rapid means for communications to and among brokers, and in 1867 stock tickers were inaugurated, reporting the sale prices of transactions to brokers, who would relay them to their customers.

B. The Volume Crunch

With the participation of millions of individuals and the growth of institutional participation in the securities markets, serious strains developed in the operational structure of the securities markets during the late 1960's and early 1970's. Although the securities industry had for many years recognized the interdependence of each segment of that industry and had provided facilities for "clearing" transactions* as well as the execution of transactions, the structure was not prepared for the tremendous growth in trading volume that took place in the late 1960's. In 1965, the New York Stock Exchange estimated that its trading volume would range between nine to eleven million shares a day over the succeeding decade (through 1975). By 1967, however, 15 million share days were common and even 20 and 30 million share days were experienced. The total 1967 share volume on the New York Stock Exchange reached an unprecedented record of 2.5 billion shares.** In 1973, the share volume on the New York Stock Exchange had risen another 60% to 4 billion shares.***

> "With some exceptions, the financial community found itself without appropriate systems, procedures, equipment, or qualified personnel for handling its business. Further, little could be done to implement the necessary solutions on a timely basis. The

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* "Clearing" consists of the comparison of transaction data from both buying and selling firms, recording all trades, and offsetting each firm's purchases against its sales.

** SEC, Study of Unsafe and Unsound Practices of Brokers and Dealers, H.R. Doc. No. 92-231, 92d Cong., 1st Sess. 13 (1971) [hereinafter cited as SEC Study of Unsafe and Unsound Practices].

*** The New York Stock Exchange, 1974 Fact Book 74.

> problems demanded broad solutions, and no one firm could tackle them in isolation. The aftermath was virtual chaos experienced by a substantial number of firms.
>
> . . . Since the broker-dealer industry is a highly interdependent community, the problems of the less efficient firms had a rippling effect on the entire broker-dealer community; and inter-dealer clearing systems, as well as the transfer facilities of banks, were similarly taxed beyond their capacities. The entire machinery for the delivery and transfer of securities and the concomitant remittance of funds became clogged."*

The tremendously increased volume produced a large number of errors at every level of the business, which were compounded as the industry was unable to research and reconcile them in a timely manner. Losses from errors and bad debts for New York Stock Exchange member firms expressed as a percentage of the firms' net income clearly indicate the impact that the breakdown of the operational side of the securities business had on the industry:**

	Year									
	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970
Losses from errors and bad debts as a percentage of net income	3.06	5.04	2.94	2.46	2.70	5.13	4.12	6.85	18.77	13.22

The volume multiplied the levels of fails to deliver and fails to receive as a result of the clogged transfer systems and bookkeeping errors.* Because of the delays in transfer, securities were misdelivered or in some cases stolen, further compounding the recordkeeping breakdown. Stock record differences became unmanageable. Unresolved short stock record differences presented substantial exposure for a number of firms because, if they were unable to be resolved, they became liabilities of the firms.

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* *SEC Study of Unsafe and Unsound Practices* 13 (emphasis added).

** *Id.* at 100.

The Securities and Exchange Commission as early as June 1968 clearly indicated that the self-regulatory organizations (that is, the stock exchanges and the National Association of Securities Dealers (NASD)) have the primary responsibility to insure that brokerage firms' books and records are maintained currently and accurately and that firms are able to meet their obligations to settle transactions promptly.**

It was in this atmosphere that various steps were taken by the industry and particularly by the self-regulatory organizations such as the New York and the American Stock Exchanges to bring order out of the chaos. Important steps were taken to develop their electronic data processing and communications systems. A certificate depository, Central Certificate Service (CCS), was activated in February 1969 to reduce the number of actual deliveries of securities and the number of certificates that had to be transferred.* Several special clearance services also were inaugurated to provide periodic clearance of fails in listed issues, in order to effect "netting" down of fails to deliver and thus eliminate intermediate deliveries in fail items. In addition, computerized procedures were established for comparison of bond trades to ease settlement procedures in these securities.

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* A fail to deliver occurs when a broker does not deliver the certificate representing a stock or bond sold for a customer within five business days. A fail to receive occurs when the broker does not receive a certificate for stock purchased within the same period.

** SEC, Statement on Paperwork Backlogs, SEC Securities Exchange Act Release No. 8335 (June 17, 1968), [1967-1969 Transfer Binder] CCH Fed. Sec. L. Rep. ¶77,566 [hereinafter cited as SEC Statement on Paperwork Backlogs].

Finally, the many individual steps that were taken led to the consolidation of the NYSE and AMEX electronic data processing and communication services into the Securities Industry Automation Corporation (SIAC) in July 1972 and creation of the Depository Trust Company to succeed the Central Certificate Service in May 1973. SIAC, by means of its current and projected services, is designed to meet the self-regulatory agencies' responsibilities to provide and maintain effective settlement and communications systems** and to meet the mandate set forth by the Securities and Exchange Commission:

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* Brokerage firms deposit certificates in their CCS accounts and deliveries among brokers are effected by computer debits and credits from or to these accounts while the certificates remain in the CCS vault. In addition, the major New York and other banks are now participants, thereby reducing deliveries to or from those banks to settle transactions made for trust accounts and clearance accounts. The major New York banks are also participating in the CCS collateral loan program whereby brokerage firms can provide collateral for customer or firm related loans by debiting their CCS accounts and crediting the lending bank's account.

** See SEC Statement on Paperwork Backlogs.

> "There is no area of the securities business which offers more opportunity for reducing costs as well as exposure to the kind of disruption which resulted in loss to customers during the 1969-70 period, than the improvement and modernization of the systems for clearing, settlement, delivery and transfer of securities. It was the archaic method of achieving this simple objective which nearly drowned the financial community in a tidal wave of uncontrolled paper. It is clear that modern communications and computer technology have now advanced to a point where the transfer of stock ownership, the payment therefor, and the documents controlling and recording the transfer of ownership and payment can be dramatically simplified. . . . *What is needed now is a force to direct and accelerate the evolution of these efforts into a single, integrated and nationwide system of securities clearance, settlement and delivery*."*

SIAC today represents the nucleus for the "single, integrated and nationwide system of securities clearance, settlement and delivery" envisioned by the SEC, and SIAC's communications services are vital to achieving the SEC's goal.

II. The Current Role of SIAC/SECTOR in the Market System

While the securities trading markets can be viewed as a single, complex mechanism, it will be helpful first to review SIAC's current role in this system as providing services to several interdependent market systems and services, namely

- The trade system, which involves the placing and execution of orders.

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* *SEC Study of Unsafe and Unsound Practices* 35-36 (emphasis added).

- The market data system, which processes and distributes information on current market activities.
- The clearance and settlement system, which completes trades by the delivery of securities and payments therefor.
- Exchange services, which relate to the regulation, surveillance, and administration of the markets.
- Financial information services, which enable investors to obtain information on economic and financial developments.

To assist in understanding SIAC's present and future functions, the market system discussion will be preceded by a description of SIAC's "SECTOR" division through which most of SIAC's communications services are rendered.

A. SIAC's "SECTOR" Division

SIAC's industry communications functions are performed primarily through its division known as SECTOR (SECurities Telecommunication ORganization). Formed in early 1971 by the New York Stock Exchange, the American Stock Exchange, and the Association of Stock Exchange Firms, SECTOR was initially a policy board composed of members of its three founding organizations, with AMEX as its operating manager. Primary goals were to increase the cost-effectiveness and efficiency of the industry's communications systems.

With the creation of SIAC in 1972 as a subsidiary of the NYSE and the AMEX, SECTOR became one of SIAC's operating divisions. The SECTOR operation still retains a separate advisory board of ten representatives, drawn from the Securities Industry Association (SIA, the successor to the Association of Stock Exchange Firms), American, New York, Mid-West and Pacific Coast Stock Exchanges, as well as SIAC representation. The chairmanship is held by an SIA representative to strengthen SECTOR's industry orientation.

The SECTOR communications network ordered by SIAC consists of voice and data circuits supplied by a mix of common carriers, including AT&T, Western Union, MCI, and RCA Globcom.

The network, which fans out from New York City, comprises 107 teletype circuits totaling 143,820 miles and 660 voice circuits totaling 264,893 miles,* serving some 20 cities in the United States -- including two west coast cities reached by domestic satellite channels.

SECTOR network service is available on a not-for-profit basis to all stock exchanges and their instrumentalities, the National Association of Securities Dealers (NASD), and to all firms which are members of stock exchanges or the NASD, i.e., virtually all registered broker-dealers in exchange listed and over-the-counter securities. Thus, the eligible users include virtually all elements of the securities market system. SECTOR services are provided to industry members on a cost-recovery basis designed to cover operating and administrative costs without profit to SIAC, the NYSE, or the AMEX.

The SECTOR staff functions comprise, for example, system planning, circuit ordering, network management including coordination of installation and maintenance, multiplexing, negotiations with common carriers, user liaison, and tariff and regulatory analyses.

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* Figures as of end of October 1974.

The SECTOR network has proved to be cost-effective. The market functions which it will assist, now and in the future, are explained in succeeding sections of this presentation.

B. The Trade System

The central function of the securities market is the purchase and sale of securities through the trading system. The trading system includes that portion of the exchange market system starting with the placement of an order to the exchange, the entire trading process, and finally the notification of the results of the trade to the market data system, the clearing and settlement system, and the investor.

This system consists of numerous elements, many of which involve extensive and complex data processing functions, and all of which must be interconnected by rapid and efficient communications. SIAC performs a vital role in operating many of the data processing elements of the trade system, and in providing, through SECTOR, essential communications links between elements.

A typical order originates with a client's telephone call to his registered representative at the office of a member firm. The office taking the order transmits this order to its main New York office or the office of a New York correspondent, in many cases using SIAC's telecommunications network, SECTOR, heretofore described.

For round-lot orders,* the New York office of the member firm routes the order to the proper exchange, NYSE or AMEX, and transmits the order to the firm's unit on the floor of the exchange. Many larger firms have installed computers which, using SECTOR lines, route orders directly from branch offices to the floor of the exchange without intervention by their New York order room.

When the order is received on the floor, it is given to a broker for execution in the continuous auction market process described above.

If the broker cannot execute the order in a reasonable period of time, he gives it to the specialist for execution.** SIAC operates the Floor Terminal System at the New York Stock Exchange to provide specialists with an electronic communication and inquiry device at their trading posts. Consisting of a CRT terminal and a keyboard, the device provides an inquiry service for quotations, allowing the specialist to monitor the activity of a stock without leaving his post. In the future, the Floor Terminal System could aid the specialist in the recording in his book of various buy and sell orders placed with him by other brokers. The Floor Terminal System also could be used to link the specialist, through the SECTOR network, to specialists on the regional exchanges and other market makers to give him access to bid and ask quotes from the various markets in those stocks in which he makes a market and to provide those market makers with his quotes.

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* A round-lot order is usually for 100 shares, or multiples thereof.

** A specialist is an exchange member who handles orders in a certain stock on the floor, and maintains an orderly market by buying and selling it for his own account.

When a trade is executed on the floor, information on the price and volume is entered into the SIAC-provided and operated market data systems of the NYSE and the AMEX. Also, a report of execution is transmitted to the broker's New York order section, and from there is transmitted via SECTOR back to the branch or correspondent's office, where the information is used to prepare a confirmation to be sent to the customer in order to comply with §11(d)(2) of the Securities Exchange Act of 1934.* In some firms the confirmation is actually prepared by computer in New York and is electronically transmitted over SECTOR to the branch office for mailing to the customer.

The report of execution received from the floor in the broker's New York office is also used by the broker's "back office" as an input to the clearance and settlement system, and to prepare customer bills, which may then be transmitted over SECTOR to the branch office.

Odd-lot orders are handled somewhat differently because the auction market trading on the floor of the exchange is conducted in round lots. Odd-lot trading is very significant for the public investor, particularly the small investor, and represents nearly half of the total number of public transactions. Odd-lot orders do not enter the flow of buy and sell orders in the regular auction market, but are filled, in the case of NYSE-listed stocks, by an odd-lot dealer (the firm of Carlisle DeCoppet & Co.), or, in the case of AMEX-listed stocks, by the specialist acting as a dealer for his own account. Odd-lot orders are executed at a fraction of a point above (for a buy order) or below (for a sell order) the next round-lot sale in the stock.

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* See 15 U.S.C. §78k(d)(2) (1970).

Member firms' offices are electronically linked to SIAC's Common Message Switch (CMS), which routes all odd-lot orders to the appropriate odd-lot dealer for execution, enabling a member firm to transmit orders via its own communications lines (with varying line disciplines) in a standard format.

CMS receives NYSE odd-lot orders from the broker, edits them, transmits them to Carlisle DeCoppet for automatic pricing (SIAC's Market Data System transmits the necessary price input to Carlisle DeCoppet), and returns the Carlisle DeCoppet execution reports to the member firms.

For odd-lot orders in AMEX-listed securities, CMS transmits orders to the appropriate specialists' post on the floor, and relays reports of execution back to the member firms.

SIAC's procedure is fast and accurate and eliminates a considerable amount of paperwork. Last year, SIAC's Odd

Lot Automation System, the predecessor of CMS, handled more than 5 million orders for the NYSE alone. CMS is the foundation for the possible automatic execution of round-lot orders in the future.

SIAC's planned Automated Bonds System (ABS) will use computer technology to increase speed and reduce costs of bond trading on the NYSE. Electronic links between member firms and the Bond Room will provide automated quotations for cabinet, i.e., less active, bonds. Also under development are automated quotations for all bonds, and electronic storage, retrieval, and matching of orders for nonconvertible cabinet bonds. In the future ABS could provide locked-in trading for all bonds and a computer-driven bond ticker.

C. The Market Data System

The market data system processes and generates information concerning market activities. SIAC's Market Data System II is the heart of this system for the NYSE. A separate SIAC data processing and communications facility is used for the AMEX market data system. These sophisticated and reliable data processing systems receive last sale price and volume data on trades from the floors of the NYSE and the AMEX, rapidly process this information, and provide it for the exchanges' nationwide tickers, the independent companies which supply automated market data information services, and the press. In addition, the market data system is used to collect and distribute quotations to the information services. Finally, the market data system provides the inputs into the data base used to develop clearance and settlement prices and reports for the exchanges' regulatory and surveillance activities.

Market Data System II will function as the central data processor for the Consolidated Tape System, which, in accordance with SEC Exchange Act Rule 17a-15, will facilitate wide public distribution of the last sale prices for eligible listed securities traded on any market in the United States. In addition to the SIAC-provided communications between the NYSE and the AMEX to the Market Data System, SIAC's SECTOR network can be used to connect the regional exchanges to the SIAC-operated Consolidated Tape System.

In the future, the Market Data System and SECTOR could also be used to gather and disseminate specialists' and dealers' competitive quotes as may be required by SEC regulation.*

D. The Clearance and Settlement System

The clearance and settlement of transactions consists of transmittal and processing of information, certificates, and funds after the execution of a trade. It is the trade completion process. Each exchange has its own "stock clearing house" for the comparison of transaction data submitted by clearing members and the determination of net balances of shares and cash to be received or delivered in settlement of a particular day's transactions. Actual delivery of securities is made through the clearing house, either by physical delivery, or by computerized delivery by book entries on the accounts of a certificate depository.

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* See Proposed SEC Exchange Act Rule 17a-14.

SIAC has combined the clearance and settlement operations of the New York and American Stock Exchanges by merging their activities into a consolidated system in one location. SIAC has also developed a Continuous Net Settlement system to replace the "delivery balance order" system now in use. Under Continuous Net Settlement accounting, deliveries of securities will be made through bookkeeping entry, thus eliminating much of the securities handling in SIAC. Procedures will be simplified. Brokers will be able to have same-day turnaround of securities, and firms will find economies of manpower requirements, increased fail control, and diminished paperwork and interest expenses.

SIAC's Continuous Net Settlement system can be linked by SECTOR facilities to the regional clearing corporations and thus handle clearing and settlement on a national basis. Also, clearing corporations and brokers throughout the United States can interface over SECTOR with the depository facilities of the Depository Trust Company.

SIAC also operates a Direct Clearing service which performs back office functions relating to Purchase & Sales and Cashiering* for smaller, out-of-town brokerage firms. SIAC's Direct Clearing service includes clearance of over-the-counter trades with the National Clearing Corporation, liaison with the Midwest Service Corporation bookkeeping system, and a securities transfer service. Dial-up telephone facilities are available to transmit hard copy of position reports by facsimile and/or magnetic tape, but the larger, out-of-town firms will probably use SECTOR services.

SIAC's Correspondent Delivery and Collection Service is a nationwide network of correspondent clearing corporations that permits next-day delivery of securities for payment to out-of-town brokers and banks.

E. Exchange Services

SIAC provides the NYSE and the AMEX with numerous administrative reports. Using data derived from the systems operated by SIAC, SIAC's computers prepare the exchanges' billing, payrolls, general ledgers, accounts payable, and budgets.

In the area of regulation and surveillance, SIAC, in furtherance of the exchanges' self-regulatory obligations under the Securities Exchange Act, provides processing for income and expense reports, stock list, member firms' trading analyses, Joint Regulatory Reports, margin extensions, and Subordinated Loans.

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* Purchase & Sales and Cashiering include such operations as the processing of office and floor reports of executed transactions, preparing the data that form the basis for original entry records that reflect cash transactions, and the receipt and delivery of securities.

Finally, SIAC provides a computer time sharing service, using dial-up telephone facilities, which ties into the trading and clearance and settlement data bases, and is now used by the AMEX for the preparation of reports and analyses in finance and surveillance.

As a result of these facilities and services, including SECTOR, developed by SIAC and other exchanges, substantial progress has been made in the alleviation of the critical problems which beset the industry in the late 1960's. During the last six months of 1968, NYSE member firms "aged" fails to deliver averaged $679 million each month.* During 1973 this figure had dropped to an average of only $28 million each month, as a result of the services now provided by SIAC in conjunction with new exchange procedures. Although improvements have been made, there is still room for further improvement in the securities industry through the development of the central market concept.

F. Financial Information Services

The SECTOR circuits used by brokers are essential not only to transmit orders by buyers and sellers to a centralized market, but also to disseminate financial information to investors. For the nation's capital markets to function efficiently, a vast amount of financial information must be transmitted daily. Rapid and efficient communication of this information is an industry obligation to the investing public and the financial community in general.

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* An "aged" fail to deliver occurs when the fail continues for 30 days or more.

The main objective of the federal securities laws, the listing requirements of the securities exchanges, and the SEC's regulations, is to provide full, accurate, and timely disclosure of information to the financial community concerning the nature of securities, the corporations which issue them, and other facts affecting the economy. The Securities Act of 1933* is designed to provide full disclosure to prospective purchasers of new securities offered pursuant to prospectuses filed with the SEC, and the Securities Exchange Act of 1934** requires the filing of annual and periodic reports with the SEC and the principal stock exchanges concerning the current status of and developments in companies whose securities are outstanding and traded in the marketplace.

These statutes and the SEC's regulatory program attempt to place private investors on an equal basis with professionals in the capital markets and to preclude the preferential use of material inside information. Companies are obligated immediately to disclose to the public both positive and negative information which could have an impact on the market in their securities. Moreover, inside "market" information that might affect the decision of investors may not be used by professionals prior to its release.*

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* 15 U.S.C. §77a _et seq._ (1970).

** 15 U.S.C. §78a _et seq._ (1970).

As a result, numerous reports are announced daily by companies whose securities are traded in the markets. Not only must this information be communicated to the investors, but it must also be analyzed and evaluated in the perspective of the company's continuing operations, its industry, and the economy as a whole.

To fulfill this vital function, most broker-dealers employ a staff of research analysts to monitor continuously and analyze companies whose securities are traded in the markets. Not only are detailed research reports prepared and distributed, but also up-to-the-minute information is transmitted over private line facilities to the broker-dealers' branch offices which in turn convey it to the customers.

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* See, e.g., SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).

As the SEC pointed out in its 1963 Study of Securities Markets:

> "A still broader point is that wider dissemination or at least wider availability of filed information ought to be generally fostered. Today's advanced techniques for speedy and inexpensive communication . . . make quite obsolete and inadequate the present system -- essentially unchanged for a generation -- of requiring 'public' filing in but one or two locations and providing copies only with considerable delay and at substantial cost."*

It is even more evident today that the country' economy and capital markets are subject to rapid and constant change. As a result, timely and meaningful information upon which investment judgments are made must be communicated rapidly to the investing public. The communications facilities of the securities industry to a great extent have filled these needs. As observed by the former Director of the Special Study of Securities Markets:

> "*[F]or the most part the public's access to the disclosure files is and must be an indirect one, through the medium of the organized financial community of registered broker-dealers and investment advisers*. This is as appropriate as it is inevitable: *while the disclosures are provided for the investing public and not the financial community as such, the latter is an essential middleman* in seeking out, digesting, and evaluating data that would otherwise be far too voluminous to be of real use to most investors."**

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* *SEC 1963 Special Study* pt. 3 at 59.

** Cohen, *"Truth in Securities" Revisited*, 79 *Harv. L. Rev.* 1340, 1377 (1966) (emphasis added).

The rapid dissemination of the important essence of this information through these "middlemen" is essential in order for the public investor to participate in and to have confidence in the securities markets.

III. The Central Market System

As early as 1971, the SEC advocated the creation of a Central Market System. Such a system had become necessary as a result of the rapid changes that were occurring in the securities market brought about by increased trading volume, the negotiated nature of many institutional transactions, stock exchange minimum fixed commission rates, and the technological changes in data processing.* The SEC's concept of the Central Market System is "a system of communications by which the various elements of the marketplace, be they exchanges or over-the-counter markets, are tied together."** Further, "the central market system will encompass a network of brokers and dealers, operating both from offices and on exchange floors, linked together by an electronic communications network and subject to a common regulatory framework."***

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* SEC, Institutional Investor Study Report, H.R. Doc. No. 92-64, pt. 8, 92d Cong., 1st Sess. XXII-XXV (1971).

** SEC, Statement on the Future Structure of the Securities Markets, SEC Securities Exchange Act Release No. 9484 (Feb. 2, 1972), [Special Studies 1963-1972 Transfer Binder] CCH Fed. Sec. L. Rep. ¶74,811 at 65,614.

*** SEC Central Market Policy Statement 12.

The Advisory Committee on the Central Market System ("Advisory Committee"), appointed by the SEC, also viewed the system as "in essence a 'system of communications' by which the various markets are 'tied together.'"* It was the Committee's view that separate markets would continue as separate competitive elements with the efficiency and quality of each increased by being "tied together" in such a comprehensive central market system. In this way, the SEC believed the goal of reducing or eliminating market fragmentation could be achieved by providing a means by which all indications of investor buying and selling interest could be exposed to each other thereby increasing the opportunity for them to offset one another.**

While the SEC endorsed the concept of competing markets "tied together," it recognized that certain functions of this central market system would have to be provided on a common basis. Thus the SEC observed: "Certain joint functions of the system could be administered by a consortium of the stock exchanges and the NASD, which could act to ensure proper coordination among the various components of the system. . . . The activities of this organization would be under the aegis of the Commission."***

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* SEC, Advisory Committee Report on a Central Market System, CCH Fed. Sec. L. Rep. No. 469 at 5 (March 6, 1973).

** SEC Central Market Policy Statement 17.

*** Id. at 13.

As the first step in implementing the new system, the SEC proposed Securities Exchange Act Rules 17a-15 and 17a-14 which in substance proposed that each of the marketplaces make available last sale information and current bid and offer quotations. Rule 17a-15, which has been adopted by the SEC, requires the stock exchanges and the NASD to file a plan providing for the dissemination of the last sale information with respect to eligible securities traded on stock exchanges and in the over-the-counter market.

The plan ultimately filed and declared effective by the SEC under its Rule 17a-15 provided for the formation of a consortium of the stock exchanges and the NASD known as the Consolidated Tape Association (CTA) and the engagement of SIAC as the central processor of all last sale information reported to it.* Under this Rule and the plan, intercommunication among SIAC and the various market elements is essential for the consolidated tape to function. In addition, the data base established by SIAC will also be utilized by the self-regulatory agencies and the SEC in their monitoring and surveillance functions.

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* SIAC was selected as the processor on the basis of the following:

1. It had and was continuing to develop new automation plans and projects, including a new ticker operation.

2. It was subject to SEC oversight and would create and maintain a data base from the last sale price information which would be made available to the self-regulatory agencies and the SEC.

3. It would provide its services at cost thus providing the securities industry substantial economies.

4. Its selection would avoid duplication of facilities and unnecessary cost.

(Plan Submitted by the CTA pursuant to Rule 17a-15 of the Securities and Exchange Commission).

The next step in the implementation of the central market system is the establishment of a consolidated quotation system. In order to proceed to this phase, the SEC proposed to adopt a new Rule 17a-14.* The rule, like Rule 17a-15, would require each stock exchange and the NASD to file a plan with the Commission for the instantaneous dissemination of current bid and offer quotations from each market maker in eligible securities. While the rule at this time has not been adopted and, of course, no plan has been submitted to the SEC for review and approval, communications links between and among all markets and all broker-dealers will be essential.

Brokers will be required to route their customer's order to the "best market" based upon the current bid and offer quotation information provided by the consolidated quotation system. Thus, every broker will need to be linked through communications facilities to the consolidated quotation system. The "routing" of orders by brokers with a significant branch system would have to be accomplished through the use of message switching equipment. Accordingly, either each broker will provide the necessary message switching to direct his customer's order to the "best market" (with provision for rerouting if no execution results or if only a portion of the order is executed) or economies of scale will be employed and a central message switch will be provided whereby each broker's customer orders in eligible securities will be transmitted to the central message switch for routing to the "best market."

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* SEC Securities Exchange Act Release No. 10,969 (August 14, 1974), *CCH Fed. Sec. L. Rep.* ¶79,931.

Such a system is ideally suited for an industry-owned and operated data processing and communication entity such as SIAC. Each market-maker participant, be he a specialist on a stock exchange or an over-the-counter market maker, and each broker-dealer will have a common requirement for access to the quotations.

The communication system that will evolve to become the Central Market System will also provide a mechanism for a unified and comprehensive automated pre-trade and post-trade system whereby order execution will activate all the post-trade settlement and accounting processes (the "locked-in trade"). This step was envisioned by the SEC in its Study of Unsafe and Unsound Practices of Brokers and Dealers when it set forth, among others, the objectives of the development of communication channels to bring about the instantaneous execution and settlement through real time crediting and debiting of accounts and registration of stock ownership, and the development of a clearance and settlement system that will interface with certificate depositories.*

Looking toward this central marketplace, SIAC has developed a long range plan for the late 1970's directed toward the objective of utilizing "point of sale" type data processing and communications technology to reduce the labor-intensive support associated with the floor trading processes and to permit identification of the parties to a sale (trade) at the time of execution thereby eliminating the time required to make this identification during the clearance process.

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* SEC Study of Unsafe and Unsound Practices 37.

IV. Current Customer Status of SIAC Under Common Carrier Tariffs

AT&T, Western Union, MCI, and RCA Globcom now recognize SIAC as a "customer" for various communications services. The tariff provisions of the latter three common carriers are virtually identical and provide that an entity, (1) "in the same line of business" as other authorized users and (2) having "a communication requirement of [its] own," may be recognized as a "customer" for services used by other members of an industry. For example, Western Union Tariff F.C.C. No. 254 provides:[*]

> "2.2 Use of Service
>
> 2.2.1 A private line service may be used only for one or more of the following. . . .
>
> . . . .
>
> (C) For the transmission of communications between stations of authorized users connected to the service and relating directly to matters of common interest to such authorized users, where the customer and all authorized users are in the same line of business.
>
> . . . .
>
> 2.5 Definitions
>
> . . . .
>
> Authorized User: The term 'authorized user' denotes a person, firm or corporation who is authorized by the customer to be connected to the service of the customer or a person, firm or corporation who is authorized by a joint user to be connected to the service

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[*] *See also* MCI Tariff F.C.C. No. 1 ¶¶B.7, C.6.012; RCA Globcom Tariff F.C.C. No. 93 ¶2.4 ("Authorized User" & "Customer").

> of the joint user. An authorized user must be specifically named in the application for service and a station of the private line service must be located on his premises. Only the following may be authorized users:
>
> . . . .
>
> (c) Persons, firms or corporations in the same line of business as the customer. Banks, security dealers and exchange brokers dealing in stocks, bonds or commodities shall be considered to be in the same line of business.
>
> . . . .
>
> Customer: The term 'customer' denotes the person who or the firm or corporation which orders service and is responsible for the payment of charges and compliance with Telegraph Company regulations. No one may be a customer for a private line service who does not have a communication requirement of his own for its use . . . ."

A. SIAC/SECTOR and Users in the Same "Line of Business"

SIAC/SECTOR is in the same "line of business" as the authorized users of SECTOR services, *e.g.*, the exchanges, their member firms, the National Association of Securities Dealers (NASD), its members, and other elements of the securities market system.

As was more fully explained in Section I.A *supra*, the "business" of the exchanges, as defined by the Securities Exchange Act of 1934, is the provision of "a market place or facilities for bringing together purchasers and sellers of securities."*

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* 15 U.S.C. §78c(a)(1) (1970).

Such facilities include the "tangible or intangible property whether on the premises or not, [and] any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communications to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange)."* Exchange members are engaged in transmitting customer orders to and from the exchange, reports of executions of trades, and information for the settlement of such transactions. Members also provide facilities to disseminate current market, analytical, and financial information concerning companies whose securities are traded in the markets.

Similarly, like the exchanges, NASD (a "national securities association" under §15A of the Exchange Act) has prime regulatory responsibility for its members, over-the-counter (OTC) broker-dealers. Like exchange members, the OTC broker-dealers are also engaged in the business of furnishing facilities and services for the trading of securities.

As was also set forth in greater detail in Section II supra, SIAC/SECTOR facilitates the trading of securities by providing the exchanges, NASD, and the members thereof with neccessary communications facilities and services. Thus, SIAC, the exchanges, exchange members, NASD, and NASD members are all engaged in the same "line of business," namely the provision of facilities and services essential to the trading of securities.

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* Id. §78c(a)(2).

B. SIAC's "Communication Requirement"

Additionally, SIAC has a "communication requirement of [its] own" for the use of the SECTOR network. The principal purpose of communications systems in the securities industry is to forward buy and sell orders from diffused sources throughout the country to a point, such as an exchange, where, by the matching of buy and sell orders, transactions may be executed. Ancillary to this principal purpose is the use of such communications facilities to disseminate market and other financial information and to transmit data relating to accounting and settlement of securities transactions.

The SEC has made it clear that the exchanges have the duty of regulating all facets of member firms' dealings. As the Supreme Court made clear in Silver v. New York Stock Exchange, the exchanges' regulatory responsibility extends to transactions involving over-the-counter securities as well as listed securities, "for members inevitably trade on the over-the-counter market in addition to dealing in listed securities, and such trading inexorably brings contact and dealings with nonmember firms which deal in or specialize in over-the-counter securities."*

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* 373 U.S. 341, 353-54 (1963) (footnote ommitted).

That the exchanges have the obligation to utilize modern technology to improve operational efficiency throughout the industry was detailed by the SEC in its Special Study of the Securities Markets submitted to the Congress in 1963.[*] Specifically, with respect to improving the "back office" operations of members, the SEC in 1968 stipulated that "the self-regulatory organizations have primary responsibility in this area."[**]

This obligation to actively improve the operating efficiency of the securities industry was echoed in an address delivered by James J. Needham, then SEC Commissioner, on May 17, 1971:

> "Contrary to what many may think, the self-regulatory responsibility granted the securities industry extends beyond the basic objective of establishing policies and practices intended to insure that investors have equal opportunity and are protected against fraud. It includes the responsibility not to ignore any and all opportunities to increase operational efficiency . . . ."[***]

Unquestionably, the existence and maintenance of a modern, reliable, communications system throughout the securities industry is central to the performance of the exchanges' important regulatory duties. Indeed, the Supreme Court expressly stated as much in Silver:

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[*] SEC 1963 Special Study pt. 2 at 351-58.

[**] SEC Statement on Paperwork Backlogs.

[***] 102 BNA Sec. Reg. & L. Rep. F-1.

> "The Exchange's constitutional provision and rules relating to private wire connections are unquestionably part of this fulfillment of the §6(b) and §6(d) duties, for such wires between members and nonmembers facilitate trading in and exchange of information about unlisted securities, and such contact with an unreliable nonmember not only may further his business undesirably, but may injure the member or the member's customer on whose behalf the contact is made and ultimately imperil the future status of the Exchange by sapping public confidence."*

The formation of SIAC and the organization of the SECTOR network, then, constitute two actions taken by the national exchanges in the furtherance of their statutory responsibility.

Even today, prior to the full implementation of the "Central Market System," the separate communications systems of the individual exchange member brokers, non-member correspondent brokers, and the exchanges themselves must be linked. The centralized administration of such systems through SIAC will permit coordination and further integration of the existing securities industry network, thereby bringing closer to fruition a "Central Market System" providing more efficient trading of all securities.

Thus, as a communications "alter ego" of the exchanges, SIAC/SECTOR facilitates the execution of the exchanges' vital regulatory responsibilities. In so doing, SIAC manifests a "communications requirement of [its] own." For as this Commission explained long ago:

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* 373 U.S. at 355-56 (footnote omitted).

> "It must be concluded that no interest in the content of the messages handled is necessary, but that it is sufficient if the fact that the message is sent aids the lessee [customer] in carrying out purposes of its own distinct from those of a communication carrier for hire."*

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* Aeronautical Radio, Inc. v. American Tel. & Tel. Co., 4 F.C.C. 155, 164 (1937) (An industry-owned communications company has sufficient "direct interest" in the messages transmitted by members of that industry to permit the industry company (ARINC) to order, as customer, the circuits over which these messages are transmitted.).

V. Responses to Designated Inquiries by the Commission in This Proceeding

With the foregoing background, the following responses are submitted to the specific items of inquiry articulated by the Commission. In a number of instances, where several items of inquiry deal with one concept, SIAC in these initial comments deals with those inquiries on a collective basis. This is particularly so where it appears that a detailed response can best come initially from those common carriers who might be affected by suggested courses of action.

A. Items 1-8, Inclusive, of Paragraph 31 of the Commission's Inquiry Relating to the Degree to Which "Resale" and "Sharing" of Common Carrier Services Should Be Permitted

The securities industry has had an opportunity in the past decade to see what technological improvements can mean to the efficiency of a firm and an industry. Cathode ray terminal devices, multiplexing techniques, data transmission, data processing, and message handling computers have all been employed in order to enable the various segments of the securities industry to perform their functions for the public. Arbitrary tariff restrictions, whether precluding "interconnection" of customer communications systems and terminal equipment or preventing the logical "common use" of telecommunications facilities, are clearly counter to the vital needs of our present society which requires a free flow and efficient handling of information.

Whether restrictions against "resale" of communications should be completely abolished, and whether unlimited sharing of all common carrier services should be prescribed by this Commission is an issue of such complexity and importance that SIAC, before responding in definitive terms, wishes to evaluate the initial comments herein of the variety of common carriers now providing, and seeking to provide, communications services and who have "resale" and "sharing" restrictions in their tariffs.

While deferring on the issue of ultimate forms of prescription, such as "unlimited sharing" and "unlimited resale," SIAC is of the strong view that increased sharing and joint use, and "user flexibility" in interconnection, must continue to be the trend in modern communications. From the standpoint of conservation of facilities and resources and user efficiency, to have hundreds of individual customers using single lines and single channels served by individual pieces of terminal equipment would be ludicrous. While SIAC's presently recognized customer status for its industry has meant that "sharing," as a tariff matter, has not been a major factor in SIAC/SECTOR services, the principle of common use, however defined, is important to the securities industry and should be preserved and, we believe, expanded.

B. Items 9 and 10 of Paragraph 31 Relating to "Single Customer" Tariff Provisions

Item 9

Item 9 of paragraph 31 inquires whether certain tariff provisions contained in ¶2.2.1 of AT&T's Tariff F.C.C. No. 260 and of Western Union's Tariff F.C.C. No. 254, sometimes known as "single customer" provisions, constitute unjust or unreasonable discrimination under §202(a) of the Communications Act.

Both AT&T and Western Union in their respective private line tariffs, have a paragraph which provides that:

> "A private line service may be used . . . [w]here the customer is an organized stock or commodities exchange, for the transmission of communications to or from an exchange member located on the floor of such exchange and relating directly to the business of the member."*

The above tariff clause was quoted in paragraph 22 of the Commission's Notice as a specific example of the "customer" provisions it had in mind in this investigation. While SIAC does not avail itself of this clause in the provision of its services to the industry, it is obviously designed to permit stock exchanges to provide necessary facilities for the trading of securities, consistent with their responsibilities under the Securities Exchange Act.** It is difficult to conceive how such a clause would be "unjust or unreasonable" or subject any person or class of persons to "undue or unreasonable" prejudice or disadvantage herein.

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* AT&T Tariff F.C.C. No. 260 ¶2.2.1(E); Western Union Tariff F.C.C. No. 254 ¶2.2.1(F).

** The facilities of an exchange include "any system of communication to or from the exchange." 15 U.S.C. §78c(a)(1) (1970).

Of more significance to SIAC, as observed in Part IV of this presentation, is SIAC's present recognition by Western Union as its customer under F.C.C. Tariff No. 254 ¶2.2.1(C) (and by MCI and RCA Globcom under comparable tariff language), which provides that:

> "A private line service may be used . . . .
>
> . . . .
>
> (C) For the transmission of communications between stations of authorized users connected to the service and relating directly to matters of common interest to such authorized users, when the customer and all authorized users are in the same line of business."

SIAC qualifies as a customer for the services described in the foregoing discussion because it has a "communication requirement of its own" in fulfilling its functions within the meaning of the definition of "customer" under ¶2.5 of Western Union Tariff F.C.C. No. 254 and as discussed at length in the preceding section (pp. 35-38).

This permissive clause, which allows authorized users and a customer engaged in the same line of business to communicate among themselves, is a provision of long standing and is clearly justified where an industry needs to intercommunicate and to utilize common communications services. This type of tariff clause enables Western Union, MCI, and RCA Globcom to fulfill their statutory duty to furnish service to SIAC in accordance with the opening words of Title II of the Communications Act of 1934:

> "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor . . . ."*

In view of the responsibilities imposed upon the nation's securities exchanges and SIAC, and the functions being performed by SIAC, all as described in detail in preceding sections of this presentation, SIAC's request for service is statutorily "reasonable," and the responsibility of carriers to provide service is a statutory mandate. Under such a mandate, the inquiry must be whether other tariff provisions or actions by the carriers in refusing service are violations of the §201(a) duty to provide service; not whether this permissive clause is "discriminatory."

Thus, it is SIAC's view that any carrier which refuses to honor a SIAC request for service is violating §201(a) of the Act without regard to consideration of §202(a) or questions of so-called "discrimination."

Item 10

Item 10 of paragraph 31 of the Commission's Notice asks what action the Commission should take if some of the "customer" provisions referred to in Item 9 are found to be unlawfully discriminatory.

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* 47 U.S.C. §201(a) (1970) (emphasis added).

As indicated, the tariff provisions of primary interest to SIAC, which permit a "customer" and authorized users to intercommunicate, cannot, in SIAC's view, be adjudged unlawfully discriminatory, at least in their application to industry customers such as SIAC. Indeed, a tariff provision comparable to Western Union's ¶2.2.1(C) may be the appropriate solution for other carriers to adopt so as to comply with their duty under §201(a) of the Communications Act to serve industry-owned "customers" if such carriers' current "customer" or "use" tariff clauses are found to be unduly restrictive.

In other words, if the Commission finds that the practices of some carriers have constituted improper refusal of service to industry "customers," the Western Union/MCI/RCA Globcom type of tariff clause may be the solution (certainly, it is not the "problem"). In such case, it must be made clear that the definition of "customer" does embrace an industry-owned entity formed to advance, on a not-for-profit basis, the legitimate functional operations of that industry. That is, it should be found explicitly that such an entity does have sufficient "interest" in the communications of its industry to be recognized as a "customer" for the channels serving that industry. Further, this approach would assume a continuation of the traditional tariff language permitting "arrangements" between a customer and its authorized users to share the cost of the service ordered by the customer such as the provisions of AT&T Tariff F.C.C. No. 260 ¶2.2.3; Western Union Tariff F.C.C. No. 254 ¶2.2.3; MCI Tariff F.C.C. No. 1 ¶C.6.032; and RCA Globcom Tariff F.C.C. No. 93 ¶2.2(B).

C. Item 11 of Paragraph 31 Relating to the Regulation of Sharing Agreements

Item 11 of paragraph 31 sets forth three questions relating to the regulation of sharing agreements:

> (1) Should the Commission regulate the sharing agreements made between customers and joint users and, if so, to what extent and in what manner?
>
> (2) What reports should be required?
>
> (3) Specifically consider possible guidelines governing the manner in which the cost of effectuating the sharing arrangement should be shared so that there is a clear distinction between sharing and resale?

It appears that by "sharing agreements," the Commission is referring principally to the provisions for "Joint Use Arrangements" in the carriers' private line tariffs whereby any entity designated by the customer as a "joint user," who pays a portion of the charge for the service, may use the service of the customer.* As explained above, "sharing" in the sense of unlimited joint use arrangements, has not been a substantial factor in SIAC/SECTOR operations.

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* See, e.g., AT&T Tariff F.C.C. No. 260 ¶¶2.5, 3.1.5; Western Union Tariff F.C.C. No. 254 ¶¶2.5, 3.1.5; MCI Tariff F.C.C. No. 1 ¶¶B.10, C.6.02; RCA Globcom Tariff F.C.C. No. 93 ¶¶2.4, 3.4. Some other carriers use other terms to describe similar, although not always identical, arrangements. See, e.g., AT&T proposed Dataphone Digital Service Tariff F.C.C. No. 267 ¶2.2.5(B) ("Shared Use"); SPCC Tariff F.C.C. No. 1 ¶3.4 ("Shared Channels"); Datran Tariff F.C.C. No. 1 ¶3.8 ("Split Billing Arrangement"); WTCI Tariff F.C.C. No. 6 ¶3.7 ("Shared Circuit Service").

As distinguished from a "joint user," the term "authorized user" is used, in the AT&T and Western Union private line tariffs and those of some other carriers, to denote an entity connected to the service of the customer or joint user.* Speaking quite broadly, an "authorized user" may be distinguished from a "joint user" by reference to the "Use" regulations of these tariffs which specify the permissible uses of the service, and hence delimit those entities which may be connected as authorized users.** For example, as discussed above, it has been recognized that a customer such as SIAC -- an industry-owned communications company -- may be imbued with a communications requirement of its own for service between industry members, and the tariffs thus allow entities in the same line of business as the customer to be authorized users of the service.***

Essentially, these tariffs recognize a community of interest in the use of communications services among the customer and "authorized users" and, in effect, the interest of the customer in the service.

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* See, e.g., AT&T Tariff F.C.C. No. 260 ¶2.5; Western Union Tariff F.C.C. No. 254 ¶2.5; MCI Tariff F.C.C. No. 1 ¶3; RCA Globcom Tariff F.C.C. No. 93 ¶2.4.

** See, e.g., AT&T Tariff F.C.C. No. 260 ¶2.2.1; Western Union Tariff F.C.C. No. 254 ¶2.2.1; MCI Tariff F.C.C. No. 1 ¶C.6.01.

*** Western Union Tariff F.C.C. No. 254 ¶2.2.1(C); MCI Tariff F.C.C. No. 1 ¶C.6.012; RCA Globcom Tariff F.C.C. No. 93 ¶2.4 ("Authorized User" (c)).

Because of the customer's interest in the service, the tariffs do not require that authorized users pay a portion of the charge for service, as is the case with joint users,* nor do the tariffs set limits on the services to which an authorized user may be connected, whereas joint use arrangements are generally only available for voice grade and under services.** Of course, authorized users, as well as the customer, have an interest of their own in the communications service, and the tariffs have traditionally recognized this by permitting, but not requiring, an arrangement between the customer and authorized users to share the cost of service.***

Thus, at this time, SIAC will reserve comment on the Commission's specific inquiry as to the regulation of unlimited joint use agreements involving communications service in which the customer has no interest of its own.

However, SIAC is convinced that it would be neither desirable nor appropriate for the Commission to regulate cost sharing arrangements between SIAC and those it serves, or similar arrangements for other industries.

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* E.g., compare AT&T Tariff F.C.C. No. 260 ¶2.5 ("Authorized User") with id. ¶¶2.5 ("Joint User"), 3.1.5(A)(5).

** See, e.g., AT&T Tariff F.C.C. No. 260 ¶3.1.5.

*** E.g., AT&T Tariff F.C.C. No. 260 ¶2.2.3; Western Union Tariff F.C.C. No. 254 ¶2.2.3; MCI Tariff F.C.C. No. 1 ¶C.6.032; RCA Globcom Tariff F.C.C. No. 93 ¶2.2(B).

While refraining from entering upon an extended discussion of legal precedents at this point, SIAC strongly believes that its communications services, rendered only to the securities industry and on a non-profit basis, are not a "public" offering "for hire" concerning which the Commission should exercise any regulatory control. Regardless of the theoretical limits of the Commission's regulatory jurisdiction, we believe that the Commission's historic policy of refraining from regulating not-for-profit cost-sharing arrangements is so well established that no extensive legal argument, at this juncture at least, is required. Perhaps this past policy was most succinctly put in the Commission's Report and Order on Cooperative Sharing of Operational Fixed Stations where the Commission said that it has "long made the distinction between persons engaged in providing service as common carriers and those rendering service on a nonprofit, cooperative basis."* There is no basis for departing from that "distinction" here.

Moreover, as a practical matter, SIAC's structure and operations obviate any need for FCC regulation of its cost sharing arrangements. SIAC is owned and operated by the securities industry which it serves. Specifically, SIAC is owned by the two major self-regulatory exchanges and its SECTOR operation, in particular, is governed by a broadly based securities industry board. In addition, SIAC is charged with the responsibility of providing efficient and effective communications services for the industry to which it is dedicated. Because of these factors, there is inherent in SIAC's operation and purpose reasonable assurance that SIAC's cost sharing arrangements will not involve abuses, such as unreasonable or discriminatory charges, of possible concern to the Commission.

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* 4 F.C.C.2d 406, 417 (1966).

Finally, the fact that the securities industry is pervasively regulated by the Securities Exchange Commission provides additional assurances, if any were needed, that the public interest will be protected.

In sum, concerning the first two questions in Item 11, SIAC believes that the Commission should continue to refrain from imposing any regulatory or reporting requirements on an arrangement whereby industry entities provide not-for-profit services to their respective industries.

The third question under Inquiry Item 11 relates to possible guidelines governing the manner in which the cost of effectuating sharing arrangements should be shared so that there is a clear distinction between "sharing" and "resale." SIAC understands this question to refer to such costs as network planning and management and the provision of ancillary equipment such as multiplexers which may be necessary to implement the shared use of common carrier provided services and facilities.

While SIAC reserves comment at this point on what might be appropriate in the case of unlimited joint use arrangements, if the customer makes no profit in the recovery of these costs SIAC believes there is no "resale," and the specific arrangement between the customer and joint users should be left to the judgment of the parties in each instance.*

In any event, SIAC urges the Commission to specify that industry owned and operated entities such as SIAC, which make no profit on either their carrier provided services or other services relating to the provision of communications are not engaged in "resale" of communications, and no regulations which may be imposed on resellers are applicable to such entities.

D. Item 12 of Paragraph 31 Relating to the Regulation of Resale

Item 12 of Paragraph 31 of the Commission's Notice inquires how the Commission should regulate entities reselling communications services and facilities.

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* *Cf.* AT&T Tariff F.C.C. No. 260 ¶2.2.3; Western Union Tariff F.C.C. No. 254 ¶2.2.3.

Since SIAC is an entity controlled by and serving the regulated securities industry, and any communications services rendered by it are on a not-for-profit basis, its operations do not, in its view, involve the "reselling" of communications services.

SIAC believes that others are in a better position, at this initial stage, to comment in detail on the questions raised by Item 12. However, even for entities engaged in resale to the public for profit, SIAC believes that minimum regulation would best serve the public interest. Indeed, in the absence of a factual demonstration that competitive conditions will not prevail among resellers, the FCC should abstain completely from rate regulation and permit market forces to determine the charges of resale entities.

E. Items 1 through 5, Inclusive, of Paragraphs 29 and 30 Relating to Value Added Carriers

In paragraphs 29 and 30, the Commission poses questions suggested by Western Union relating to the public need for the services of value added carriers and the competitive impact of such services on the established carriers.

In line with SIAC's purpose of providing the most efficient possible communications services for the securities industry, SIAC endorses the concept of value added carriers as one which may prove to be useful to SIAC in carrying out its objectives. Moreover, SIAC believes that such value added carriers should be permitted to compete freely with one another and with the other carriers, with a minimum of regulation, in order that market forces can freely operate to bring to the public the most efficient and flexible possible communications services.

SIAC is, of course, not in a position at this time to comment on the impact of value added carriers on the established carriers, but does state that the Commission should demand specific and convincing proof of harm to the public interest before it undertakes any restrictive regulatory program regarding value added carriers.

VI. Conclusion

From the foregoing, it is clear that:

(1) The securities industry is highly dependent on modern, effective communications and message handling facilities and services.

(2) This industry demand for communications is characterized by a high degree of "intra-industry" traffic.

(3) The public interest and compliance with statutory and SEC imposed responsibilities require the nation's stock exchanges to assure the availability and utilization of adequate communications and message handling services.

(4) SIAC is the instrument whereby many of those communications and information handling responsibilities of the exchanges and their members are being fulfilled.

(5) Many communications common carriers, in recognition of the above, accept SIAC as their "customer" for communications services serving the industry's needs.

(6) This recognition of SIAC, and the rendering of service to SIAC upon request, is "reasonable" and thus required by §201(a) of the Communications Act, and refusal by a carrier to provide service would be in violation of the carrier's affirmative duty to provide service under §201(a) of the Act.

(7) Both with regard to the securities industry in particular, and communications users in general, the Commission should adopt a policy of maximum flexibility and minimum regulation.

(8) In particular, Commission regulation or reporting requirements regarding SIAC itself or its cost sharing agreements with securities industry members would be neither desirable nor appropriate.

Respectfully submitted,

SECURITIES INDUSTRY AUTOMATION
CORPORATION

December 11, 1974